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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 252

JOSEPH S. FINCH & COMPANY, THE OLD QUAKER COMPANY, AND SCHENLEY DISTRIBUTORS, INC., APPELLANTS,

vs.

ROY McKITTRICK, ATTORNEY GENERAL OF THE STATE OF MISSOURI, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI

FILED AUGUST 5, 1938.

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[fol. 1]

IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF MISSOURI

TEMPORARY RESTRAINING ORDER—Filed October 20, 1937

Upon this 20th day of October, 1937, this matter came on for hearing upon the plaintiffs' application for a temporary restraining order. Plaintiffs appeared by their attorneys, James P. Aylward, George V. Aylward and Terence M. O'Brien, and the Court having read, examined and considered the verified Bill of Complaint and affidavits filed herein, and being fully advised in the premises, and being of the opinion that immediate and irreparable injury, loss and damage will result to the plaintiffs unless a temporary restraining order is granted, Finds, Orders, Adjudges and Decrees:

1. The injury to plaintiffs, if the threatened action of the defendants is not enjoined, is that all of plaintiffs' business in the State of Missouri and plaintiffs' profits therefrom will be destroyed and the good will which now attaches to plaintiffs' business in the State of Missouri and which plaintiffs now own and enjoy will be wiped out and the value of plaintiffs' Missouri license will be destroyed.

2. Such injury, loss and damage to plaintiffs is and will be irreparable, in that such loss, injury or damage cannot be ascertained, and would not be recoverable from any persons responsible therefor, and could not be recompensed by money.

3. This temporary restraining order is granted without notice to the defendants or to the Governor of the State of Missouri because unless enjoined by the order of this Court [fol. 2] the defendant Thomas F. Fitzgerald will forthwith give notice in writing by mail to each holder of a liquor license in Missouri, and by publication in a newspaper of

general circulation in the State of Missouri of the fact that the defendant Roy McKittrick has filed with him certificates stating that discriminatory laws are found to exist in the State of Indiana or the Commonwealth of Pennsylvania, and stating that forty-five (45) days from the date of publication of said notice it will be unlawful to import or transport into the State of Missouri or to purchase, receive, possess or sell in the State of Missouri any alcoholic liquor manufactured in the State of Indiana or the Commonwealth of Pennsylvania. The giving and publication of said notice by the defendant Thomas F. Fitzgerald will occur before due notice of this proceeding could be given or a hearing had thereon and plaintiffs would thereby immediately suffer an irreparable loss, injury and damage to their business in the State of Missouri.

4. Therefore, defendants, and each of them, their respective deputies, appointees, assistants and employees, their successors, and each of them, are hereby temporarily restrained from in any way or manner enforcing against this plaintiff, or others similarly situated, the Discrimination Act (Sections 4525 h-1 to 4525 h-6, Revised Statutes of Missouri, 1929, as amended by the Laws of 1937), and that defendant Thomas F. Fitzgerald, his appointees, assistants, employees and successors in office, and each of them, be enjoined from giving the notice or notices referred to in any newspaper or newspapers any such notice or notices, [fols. 3-4] and from publishing that, or notifying any licensees in the State of Missouri that the State of Indiana or the Commonwealth of Pennsylvania are states in which there are "discriminatory laws" within the meaning of said term as defined in said Discrimination Act, upon the giving of security by plaintiffs in the sum of One Thousand ($1,000.00) Dollars, (which sum the Court deems proper), conditioned upon the payment of such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained hereby, and now plaintiffs tender such security, and same is by the Court approved.

5. Plaintiffs' application for an interlocutory injunction is hereby set down for hearing on the 7th day of December, 1937. Service of a copy of this temporary restraining order upon the Governor of the State of Missouri and the

defendants, at least five (5) days prior to such hearing shall constitute sufficient notice.

6. This temporary restraining order shall remain in force only until the hearing and determination of plaintiffs' application for an interlocutory injunction upon notice as aforesaid.

Dated this 20th day of October, 1937, at Jefferson City, Mo. at 11:20 A. M.

(Signed) J. C. Collet, Judge.

[fol. 5] IN UNITED STATES DISTRICT COURT

NOTICE TO GOVERNOR OF MISSOURI—Filed January 10, 1937

To Honorable Lloyd C. Stark, Governor of the State of Missouri:

You are Hereby Notified that each of the above named plaintiffs, in each of the above entitled causes, will, on the 10th day of January, 1938, at the opening of Court, or as soon thereafter as counsel can be heard, present to a three-judge Court sitting in the Federal Court rooms at Kansas City, Jackson County, Missouri, their applications in each of the above entitled causes for an interlocutory injunction suspending and restraining the enforcement, operation and execution of a certain statute of the State of Missouri, known and designated as "House Bill No. 331, Regular Session of the General Assembly of the State of Missouri," Statutes of 1937 (Sections 4525 h-1 to 4525 h-6, inclusive, Revised Statutes of Missouri, 1929, as amended by the Laws of Missouri, 1937, page 536), which said statute is referred to as the "Liquor Discrimination Act". Said applications for interlocutory injunctions, if granted, will suspend and restrain the enforcement, operation and execution of said "Liquor Discrimination Act" by restraining the action of the Attorney General of the State of Missouri and the Supervisor of Liquor Control of the State of Missouri in the enforcement and execution of said statute. You are

further notified that said applications have been set down for hearing by the Court at the time and place mentioned.

(Signed) James P. Aylward, George V. Aylward,
[fol. 6] Terence M. O'Brien, Attorneys for Plaintiffs in Each of the Above Entitled Causes.

Due service of above notice acknowledged, this 12th day of November, 1937.

(Signed) Lloyd C. Stark, Governor of the State of Missouri.

[fol. 7] IN UNITED STATES DISTRICT COURT

ORDER GRANTING LEAVE TO AMEND BILL OF COMPLAINT—
Filed January 10, 1938

Upon this 8th day of January, 1938, plaintiffs filed their application for leave to amend their bill of complaint by interlineation, and same came on for hearing; plaintiffs appearing by their attorneys, James P. Aylward, George V. Aylward and Terence M. O'Brien, and the defendants appearing by their attorney, Edward H. Miller, Assistant Attorney General of the State of Missouri, and consenting to the granting of such leave. And the Court, having examined the application, heard and considered the statements of counsel and the consent of defendants, and being fully advised in the premises, finds that in the furtherance of justice plaintiffs' application should be sustained and plaintiffs should be granted leave of Court to amend their bill of complaint by interlineation as set out and prayed in their application;

And it is so Ordered.

J. C. Collet, Judge.

Approved: James P. Aylward, George V. Aylward, Terence M. O'Brien, Attorneys for Plaintiffs.

Approved: Roy McKittrick, Atty. Gen.; Edward H. Miller, Attorneys for Defendants.

[fol. 8] IN UNITED STATES DISTRICT COURT FOR THE CENTRAL DIVISION OF THE WESTERN DISTRICT OF MISSOURI

In Equity. No. 668

JOSEPH S. FINCH AND COMPANY, A CORPORATION; THE OLD QUAKER COMPANY, a Corporation, and Schenley Distributors, Inc., a Corporation, Plaintiffs,

vs.

ROY MCKITTRICK, ATTORNEY GENERAL OF THE STATE OF MISSOURI, and Thomas F. Fitzgerald, Supervisor of Liquor Control of the State of Missouri, Defendants

BILL OF COMPLAINT—Filed October 20, 1937

Plaintiffs for their cause of action in equity against defendants allege:

I

(a) Plaintiff Joseph S. Finch and Company (hereinafter referred to as "plaintiff Finch") is and for the past several years has been a corporation duly organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania, and is a citizen and resident of the Commonwealth of Pennsylvania.

(b) Plaintiff The Old Quaker Company (hereinafter referred to as "plaintiff Quaker") is and for the past several years has been a corporation duly organized and existing [fol. 9] under and by virtue of the laws of the State of Maryland, and is a citizen and resident of the State of Maryland.

(c) Plaintiff Schenley Distributors, Inc., (hereinafter referred to as "plaintiff Distributors") is and for the past several years has been a corporation duly organized and existing under and by virtue of the laws of the State of New York, and a citizen and resident of the State of New York.

(d) Defendant Roy McKittrick is the duly elected, qualified and acting Attorney General of the State of Missouri, and is the principal legal officer of said State charged with the enforcement of the laws of said State, and particularly a certain statute known and designated as "House Bill No.

331, Regular Session of the General Assembly of the State of Missouri, Statutes of 1931", (Sec. 4525h-1 to 4525h-6, inclusive, Revised Statutes of Missouri, 1929, as amended by the Laws of Missouri, 1937, page 536, et seq.) which statute is hereinafter referred to as the "Discrimination Act". Said "Discrimination Act" expressly confers specific powers and duties upon said defendant Roy McKittrick. Said defendant McKittrick is now and at all the times hereinafter mentioned has been a citizen and resident of Jefferson City, Cole County, Missouri, and a citizen and resident of the Western District of Missouri. The acts and threatened acts of said defendant McKittrick, as hereinafter set out, constitute an unlawful trespass upon and an unlawful invasion of plaintiffs' rights and property and an unlawful confiscation of plaintiffs' property.

[fol. 10] (e) Defendant Thomas F. Fitzgerald is now and since October 1, 1937, has been the duly appointed, qualified and acting Supervisor of Liquor Control of the State of Missouri, and as such is charged with the administration of the liquor laws of the State of Missouri. Said "Discrimination Act" confers specific powers and duties upon said defendant. Said defendant Fitzgerald is now and at all the times hereinafter mentioned has been a citizen and resident of Jefferson City, Cole County, Missouri, and a citizen and resident of the Western District of Missouri. The acts and threatened acts of said defendant Fitzgerald, as hereinafter set out, constitute an unlawful trespass upon and an unlawful invasion of plaintiffs' rights and property, and an unlawful confiscation of plaintiffs' property.

II

The jurisdiction of this Court depends upon the following facts: This is a suit of a civil nature in equity where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of Three Thousand ($3,000.00) Dollars, in that the right of plaintiff Finch to continue to manufacture alcoholic liquors in the Commonwealth of Pennsylvania and to have same transported to and imported into the State of Missouri and sold and delivered to purchasers in the State of Missouri is of a value vastly in excess of Three Thousand ($3,000.00) Dollars, and in [fol. 11] that plaintiff Finch's business, good will and going concern value in the State of Missouri are worth vastly

in excess of Three Thousand ($3,000.00) Dollars, and in that, except for the matters and things hereinafter complained of, plaintiff Finch could and would continue the manufacture for sale and distribution in the State of Missouri of large amounts of alcoholic liquors manufactured by plaintiff Finch in the Commonwealth of Pennsylvania, the profits to plaintiff Finch from the sale of which would greatly exceed the sum of Three Thousand ($3,000.00) Dollars, and in that plaintiff Finch's right to have defendants restrained from enforcing said "Discrimination Act" against plaintiff Finch is of a value vastly in excess of Three Thousand ($3,000.00) Dollars, and in that the value of plaintiff Finch's business and good will in the State of Missouri, which will be destroyed if the enforcement of said "Discrimination Act" against said plaintiff is not enjoined, is vastly in excess of Three Thousand ($3,000.00) Dollars, and in that the enforcement of said "Discrimination Act" against plaintiff Finch will damage plaintiff Finch's property vastly in excess of the sum of Three Thousand ($3,000.00) Dollars, and in that the right of plaintiff Quaker to continue to manufacture alcoholic liquors in the State of Indiana and have same transported into and sold in the State of Missouri is of a value vastly in excess of Three Thousand ($3,000.00) Dollars, and in that plaintiff Quaker's business, good will and going concern value in the State of Missouri are worth vastly in excess of Three Thousand ($3,000.00) Dollars, and in that, except for the matters and things hereinafter complained of, plaintiff Quaker could and would continue the manufac- [fol. 12] ture for sale and distribution in the State of Missouri of large amounts of alcoholic liquors manufactured by plaintiff Quaker in the State of Indiana, the profits to plaintiff from the sale of which would greatly exceed the sum of Three Thousand ($3,000.00) Dollars, and in that the value of the alcoholic liquors which plaintiff Finch has heretofore manufactured in the Commonwealth of Pennsylvania and which plaintiff Quaker has heretofore manufactured in the State of Indiana, and which plaintiff Distributors has transported to and sold in the State of Missouri was in excess of the sum of Two Million ($2,000,000.00) Dollars, and the net income from the sales thereof exceeded the sum of Three Thousand ($3,000.00) Dollars, and in the plaintiff Quaker's right to have defendants restrained from enforcing said "Discrimination Act", against plaintiff Quaker, is of a value vastly in excess of Three Thousand ($3,000.00)

Dollars, and in that the value of plaintiff Quaker's business and good will in the State of Missouri, which will be destroyed if the enforcement of said "Discrimination Act" against plaintiff Quaker is not enjoined, is vastly in excess of Three Thousand ($3,000.00) Dollars, and in that the enforcement of said "Discrimination Act" against plaintiff Quaker will damage plaintiff Quaker's property vastly in excess of the sum of Three Thousand ($3,000.00) Dollars, and in that the right of plaintiff Distributors to continue to buy alcoholic liquors manufactured by plaintiff Finch in the Commonwealth of Pennsylvania and to transport same and sell same in the State of Missouri is of a value [fol. 13] vastly in excess of Three Thousand ($3,000.00) Dollars, and in that the right of plaintiff Distributors to continue to buy alcoholic liquors manufactured by plaintiff Quaker in the State of Indiana and to transport and sell same in the State of Missouri is of a value vastly in excess of Three Thousand ($3,000.00) Dollars, and in that plaintiff Distributors' business, good will and going concern value in the State of Missouri are worth vastly in excess of Three Thousand ($3,000.00) Dollars, and in that, except for the matters and things hereinafter complained of, plaintiff Distributors could and would continue to import into the State of Missouri large amounts of alcoholic liquors manufactured by plaintiff Finch in the Commonwealth of Pennsylvania and by plaintiff Quaker in the State of Indiana, the profits from the sale of which would greatly exceed the sum of Three Thousand ($3,000.00) Dollars, and in that plaintiff Distributors' right to have defendants restrained from enforcing said "Discrimination Act" against plaintiff Distributors is of a value vastly in excess of Three Thousand ($3,000.00) Dollars, and in that the value of plaintiff Distributors' business and good will in the State of Missouri, which will be destroyed if the enforcement of said "Discrimination Act" against plaintiff Distributors is not enforced, is greatly in excess of Three Thousand ($3,000.00) Dollars, and in that the enforcement of said "Discrimination Act" against plaintiff Distributors will damage plaintiff Distributors' property vastly in excess of the sum of [fol. 14] Three Thousand ($3,000.00) Dollars, and that said controversy arises under the Constitution of the United States, as hereinafter set out, and is wholly between citizens of different States, as aforesaid.

III

(a) Plaintiff Finch now owns and operates, and for the past several years has owned and operated, a distillery and rectifying plant and establishment in the Commonwealth of Pennsylvania, at which location it manufactures and has manufactured alcoholic liquors, including gins and whiskeys. Plaintiff Quaker owns and operates, and for the past several years has owned and operated, a distilling and rectifying plant and establishment in the State of Indiana, at which location it manufactures and has manufactured alcoholic liquors, including gins and whiskeys. Plaintiff Distributors has sold and is now selling in various parts of the United States where such sales are lawful, including the state of Missouri, alcoholic liquors manufactured by plaintiff Finch at said distillery and rectifying establishment in the Commonwealth of Pennsylvania and by plaintiff Quaker at said distillery and rectifying establishment in the State of Indiana. In the State of Missouri the sales by plaintiff Distributors of said alcoholic liquors have been made under and by virtue of a non-resident permit, duly issued by the Supervisor of Liquor Control of the State of Missouri, and plaintiff Distributors now is the lawful owner and holder of such [fol. 15] non-resident permit. By reason of the quality of their products, the expenditure of a vast amount of money in advertising and solicitation in the State of Missouri, and the expenditure of a vast amount of time and effort in soliciting and in developing a distribution system, plaintiffs have built up and developed in the State of Missouri a great and extensive demand for their products, and a valuable good will and a valuable sales and distribution system, and plaintiffs have contracts with numerous employes, and others, who are engaged in the manufacture of their products in the Commonwealth of Pennsylvania and in the State of Indiana, respectively, and the transportation, distribution and sale of same in the State of Missouri.

(b) The aforesaid "Discrimination Act" was enacted by the General Assembly of the State of Missouri and thereafter approved by the Governor of Missouri on or about the 8th day of April, 1937, and according to its terms, said "Discrimination Act" is now in full force and effect. Said "Discrimination Act" provides that defendant McKittrick, the Attorney General of the State of Missouri, shall examine

the laws, rules and regulations in force in the other States of the United States pertaining to the sale and distribution of alcoholic liquors to determine whether said laws, rules or regulations discriminate against alcoholic liquors manu- [fol. 16] factured in the State of Missouri, and said "Discrimination Act" directs said defendant McKittrick to file with the defendant Fitzgerald, Supervisor of Liquor Control of the State of Missouri, a certificate as to each State in which discriminatory laws are found to exist. Said "Discrimination Act" directs said defendant Fitzgerald, as Supervisor of Liquor Control, upon the filing of such certificate or certificates, to forthwith give notice by publication to all holders of licenses authorizing the sale of alcoholic liquors of the filing of said certificates, listing therein the States in which discriminatory laws have been found to exist, and stating that forty-five (45) days from the date of the publication of said notice it will be unlawful to import or transport into the State of Missouri, or to purchase, receive, possess or sell any alcoholic liquor manufactured in a State named in any of said certificates, which notice, according to the terms of said "Discrimination Act", shall be given by publication in some newspaper of general circulation in the State of Missouri, and by forthwith mailing to each of the holders of licenses authorizing the sale of liquors at wholesale in the State of Missouri a notice containing the same information as that contained in the published notice and giving the name of the newspaper in which the notice is published. Said "Discrimination Act" further provides that forty-five (45) days after such publication and the giving of such notice, the transportation or importation into the State of Missouri or the purchase, sale, receipt or possession [fol. 17] in the State of Missouri of any alcoholic liquor manufactured in a State which has been found to have discriminatory laws, rules or regulations, shall be unlawful. Under the liquor laws of the State of Missouri, including said "Discrimination Act", it is further provided that the Supervisor of Liquor Control, defendant Fitzgerald, may revoke any license previously granted to sell alcoholic liquors in the State of Missouri for a violation of said "Discrimination Act", and said "Discrimination Act" further provides that a decision revoking a license for such violation shall be final and no right to review or appeal therefrom shall exist. Under the liquor laws of the State of Missouri any person who shall sell, transport or purchase alcoholic

liquors without a license is guilty of a felony and subject to imprisonment from two (2) to five (5) years in a State penitentiary, and from three (3) to twelve (12) months in a county jail, or a fine of from One Hundred ($100.00) Dollars to One Thousand ($1,000.00) Dollars, or both such fine and imprisonment. The liquor laws of the State of Missouri further provide that any place wherein intoxicating liquor is sold or kept for sale in violation of the laws of the State of Missouri constitutes a nuisance and said laws provide for the maintenance of injunction proceedings to enjoin such use. The liquor laws of the State of Missouri further subject real estate upon which such a nuisance is maintained to a lien to pay all fines and costs assessed against the occupant of such property.

[fol. 18] Which said "Discrimination Act" is in words and figures as follows:

"4525h-1. Definitions

For the purpose of this Act, unless the context otherwise requires, the words and phrases herein defined are used in this Act in the sense given them in the following definitions:

(1) The phrase 'Alcoholic liquor' means and includes all liquors referred to in Section 2 of an Act of the 57th General Assembly, Extra Session, approved January 13, 1934, Laws of Missouri, Extra Session, 1933-34, page 78, and any amendments thereto, and also all non-intoxicating beer as defined in Section 13139-a of an Act of the 57th General Assembly, Regular Session, approved March 15, 1933, Laws of Missouri, 1933, page 257, and any amendments thereto.

(2) The word 'manufacturer' means every brewer, fermenter, distiller, rectifier, wine maker, blender, processor, bottler, or person who fills or refills an original package, and others engaged in brewing, fermenting, distilling, rectifying, or bottling alcoholic liquor as above defined.

(3) The word 'manufacture' means to distill, rectify, ferment, brew, make, mix, concoct, process, blend, bottle, or fill an original package with any alcoholic liquor.

(4) The term 'licensee' means any person holding a valid license issued by the Supervisor of Liquor Control under

the authority given by the Liquor Control Act passed by the 57th General Assembly, Extra Session, approved January 13, 1934, Laws of Missouri, Extra Session, 1933-34, [fol. 19] page 77, and any amendments thereto, and also any person holding a valid license issued by the Supervisor of Liquor Control under the provisions of Article 9 of Chapter 93, Revised Statutes of Missouri, 1929, as amended by the 57th General Assembly, approved March 15, 1933, Laws of Missouri, 1933, page 256, and any amendments thereto.

(5) The phrase 'Attorney General' means the Attorney General of this state, or any of his regularly appointed Assistants Attorney General whom he may designate to perform his duties under this act.

(6) The phrase 'Supervisor of Liquor Control' means the Supervisor of Liquor Control appointed under Section 2 of an Act of the 57th General Assembly, Extra Session, approved January 13, 1934, Laws of Missouri, Extra Session, 1933-34, page 78, and any amendments thereto, or any of his regularly appointed assistants whom he may designate to perform his duties under this act.

(7) The phrase 'discriminatory laws' means the laws of any state, or the rules or regulations of any administrative officer, commission, or body thereof, which

(a) impose any tax, impost, or license fee upon the right to transport or import into such state any alcoholic liquor manufactured in this state; or

(b) prohibit the importation, transportation, or sale of any alcoholic liquor manufactured in this State unless the manufacturer obtains a license or pays a tax or fee when such manufacturer neither imports nor transports such [fol. 20] liquor into said state nor sells the same therein; or

(c) prohibit or restrict any licensee in said state from purchasing, or from importing or transporting into said state, Alcoholic liquor for the purpose of sale at wholesale therein from any manufacturer or whosesaler in this state, if such licensee may lawfully purchase the same kind of alcoholic liquor for the purpose of resale at wholesale therein from a manufacturer in said state without such restrictions or prohibition; or

(d) impose any different warehousing requirements or higher warehousing fees or inspection fees upon any alcoholic liquor manufactured in this State and imported or transported into such state than is imposed upon the same kind of alcoholic liquor manufactured in such state; or

(e) prohibit any manufacturer or wholesaler in this State or the agents or representatives of either from exercising the privilege of soliciting orders for the sale of alcoholic liquor manufactured in this State to any licensed wholesaler in said State, if the sale is to be made outside thereof, or to any retailer if such orders are to be filled therein by or through a licensed wholesaler in said State, if licensed manufacturers or wholesalers of the same kind of alcoholic liquor in said State or the agents or representatives of either are authorized to solicit orders for the sale of such alcoholic liquor manufactured in said State to licensed wholesalers or retailers; or requires manufacturers or [fol. 21] wholesalers in this State, or the agents or representatives of either, to secure a license or pay a fee for said privilege, if no additional license or further fee is required of licensed manufacturers or wholesalers in said State for the privilege of soliciting orders from wholesalers or retailers; or impose upon a manufacturer or wholesaler in this State, or upon the agents or representatives of either, a higher fee for the privilege of soliciting orders for the sale of alcoholic liquors manufactured in this State than is imposed upon any person therein for the sole privilege of soliciting orders for the sale of the same kind of alcoholic liquor manufactured in said state; or

(f) impose any higher fees or taxes upon alcoholic liquor manufactured in this state when imported, transported, or sold therein than is imposed upon the same kind of alcoholic liquor manufactured and sold within said state; or

(g) impose any higher fee for the privilege of selling or handling any alcoholic liquor manufactured in this state than is imposed for the privilege of handling or selling the same kind of alcoholic liquor manufactured within said state; or

(h) impose any prohibition against or limitations, restrictions, or condition upon the purchase, sale, or solicitation of orders for the sale of alcoholic liquor manufactured within this state, or upon any person purchasing, soliciting orders for the sale, or selling the same that is not imposed

upon the same kind of alcoholic liquor manufactured within [fol. 22] such state, or upon persons purchasing, selling, or soliciting orders for the sale of the same; or

(i) impose, directly or indirectly, any other prohibition, restrictions, or condition, upon the receipt, possession, disposition, or transportation of alcoholic liquor manufactured in this state, which is not equally imposed upon the same kind of alcoholic liquor manufactured in said state, and in such manner as to place the alcoholic liquor manufactured in this state at a disadvantage in competition therein with the same kind of alcoholic liquor manufactured in said state. Provided, however, that the phrase 'discriminatory laws', as above defined, shall not be deemed to include any requirement by law, rule or regulation of any state for (1) the furnishing of a bond by an importer or person first in possession of alcoholic liquor within such state, if the bond as required does not exceed the sum of $5,000 or in any event the amount of the bond required of any licensed manufacturer of the same kind of alcoholic liquor within such state, or (2) the making of reports as to the kind and quantity of liquor received or sold by such person, or (3) the obtaining of a separate license authorising only importation if no fee is required to be paid therefor, and if such license may be obtained by any person authorized to sell at wholesale, upon application therefor; and provided, further, that in order to secure said importer's license it shall not be required of any corporation applying therefor that any percentage of its stockholders or directors or officers be citizens or residents of said state; [fol. 23] or (4) the limiting of the right to import or transport into said state to those who are duly licensed to sell such liquors at wholesale.

(8) The phrase 'state in which discrimination exists' means any state of the United States as to which the Attorney General finds and certifies, as herein provided, that discriminatory laws exist, and so long as the certificate remains effective any state so certified by him shall be a 'state in which discrimination exists'. (Laws 1937, p. 536, Sec. 1.)

4525h-2. Discrimination by Other States—Duty of Attorney General

It shall be the duty of the Attorney General of this state to examine laws, rules and regulations in force in the sev-

eral states pertaining to the purchase, sale, transportation, importation, warehousing, inspection, receipt, and solicitation for sale of alcoholic liquor, to determine whether any discriminatory laws, as defined herein, exist, and he shall, within thirty (30) days after the effective date of this Act, prepare and file with the Supervisor of Liquor Control, a separate certificate as to each state in which discriminatory laws, as herein defined, are found to exist. In determining whether discriminatory laws exist, such determination shall be made irrespective of whether alcoholic liquor manufactured in this state is actually sold in or transported or imported into the state, the laws of which are under examination. Upon the filing with the Attorney General by any interested party [fol. 24] of a written complaint alleging that discriminatory laws exist in any state as to which no certificate has been filed, it shall be the further duty of the Attorney General to re-examine the laws, rules and regulations of the state named in such complaint, and, if he then finds that discriminatory laws exist in such state, he shall file his certificate within thirty (30) days after the filing of such complaint. Each certificate shall be signed by the Attorney General and shall recite that an examination has been made of the laws, rules and regulations in force in the state therein named, and that on the date said examination was completed, which date shall be specified, it is found that discriminatory laws exist in the state named therein. In such finding the Attorney General shall set out verbatim the parts or sections of such of the laws, rules and regulations which he finds to be discriminatory, and on any petition for review of or appeal from such finding, a rebuttable presumption shall exist that there are in force in such state laws, rules and regulations in the form and language as contained in such finding. Such presumption may be overcome by a duly certified and authenticated copy of the laws, rules and regulations of the state in question which shows them to be other or different from that contained in the finding of the Attorney General. Upon the filing of such certificate or certificates, the Supervisor of Liquor Control shall forthwith give notice by publication, to all holders of licenses authorizing the sale of any alcoholic liquors of the filing of said certificate listing therein the states in [fol. 25] which discriminatory laws are found to exist and stating that after forty-five (45) days from the date of the publication of said notice it will be unlawful to import or

transport into this state, or to purchase, receive, possess or sell any alcoholic liquor manufactured in a state named in any of said certificates, which notice shall be given by one publication in some newspaper of general circulation in this state. In addition thereto a notice containing the same information and giving the name of the newspaper in which the notice above provided is to be published shall be forthwith mailed to each of the holders of licenses authorising the sale of alcoholic liquors at wholesale, directed to such licensees at the address of the premises designated in said license. Upon the mailing of said notice there shall be attached to the original thereof to be filed in the office of the liquor commission an affidavit of the fact of mailing by the person so mailing, which notice with affidavit attached shall be competent proof in any proceeding under this act of the fact of the giving of said notice on the date of the mailing thereof. Any licensee or person interested may within fifteen (15) days from the date of said publication and the mailing of said notice file written application with the Attorney General for a review of any finding in respect to the laws, rules or regulations of the state named in any of said certificates. Upon any application for review of any such finding being filed, the Attorney General shall fix a time for hearing to be held upon all applications filed within said fifteen (15) day period, such hearing to be had [fol. 26] within twenty-five (25) days from the date of said publication, and, upon such hearing being had, the Attorney General shall, within thirty (30) days from the date of said publication if he finds no discriminatory laws do in fact exist in said state, file a certificate cancelling his certificate theretofore filed. But, unless such certificate of cancellation shall be so filed, the certificate theretofore filed shall remain in full force and effect. Any licensee or person interested may at any time file with the Attorney General an application for the cancellation of any certificate then on file upon the ground that discriminatory laws no longer exist in the state named therein, and it shall be the duty of the Attorney General to forthwith fix a time for hearing to be held thereon, and after the hearing, the Attorney General shall, within thirty (30) days after the date of the filing of said application if he finds that the laws of said state no longer discriminate, file a certificate cancelling the certificate theretofore filed. Any failure of the attorney

general to make a finding upon an application or complaint which may be filed under the provisions hereof, shall be deemed as a finding adverse to the complainant or applicant, and appeal may be taken therefrom as in Section 3 provided. It shall be the duty of the Attorney General, at any time he is satisfied that in any state discriminatory laws no [fol. 27] longer exist, to file his certificate cancelling the certificate of discrimination as to such state. It shall also be the duty of the Attorney General, whenever he shall determine that any state not named in any certificate theretofore filed shall have enacted discriminatory laws, forthwith to file his certificate for each state wherein such laws are by him found to have been enacted. Notice of additional certificates filed by the Attorney General shall be given in the same manner as herein provided with respect to the filing of the original certificates. After forty-five (45) days from the date of the publication and mailing of notice, as herein provided, and so long as it remains in force, such certificate shall establish conclusively that discriminatory laws exist in the state named and that the transporting or importing into this state, or the purchase, receipt, possession, or sale within this state of alcoholic liquor manufactured in such named state is a violation of Section 4 hereof. (Laws 1937, p. 536, Sec. 2.)

4525h-3. Appeal from Findings of Attorney General—Procedure

Any licensee or person interested, who has filed application for review or an application for cancellation of a certificate, and any complainant, who has filed complaint alleging the existence of discriminatory laws in any state under the [fol. 28] provisions of Section 2 hereof, may appeal from an adverse finding of the Attorney General with respect to said application or complaint to the Circuit Court of Cole County, by serving notice of appeal upon the Attorney General and filing with the Clerk of said Court a petition setting forth the finding appealed from and the grounds of such appeal, such notice to be served and said petition filed within fifteen (15) days after the last day on which the Attorney General is required by Section 2 hereof to make a finding with respect to the application or complaint from which appeal is taken. The Attorney General shall,

within ten (10) days after service of notice of appeal, file his answer attaching thereto a copy of the record of the proceedings had before him. If more than one appeal is taken from any particular finding, all subsequent appeals shall be consolidated with the one first taken and all such appeals shall be heard as one cause. Upon the trial of such appeal, the only question for determination shall be whether the Attorney General acted illegally or in excess of authority in making the finding from which the appeal is taken. The cause shall be tried by said court, or a judge thereof, at the earliest possible date, and the finding of such court or judge shall be final and no appeal shall lie therefrom. If upon trial the court or judge adjudges that the finding of the Attorney General is illegal or in excess of authority, such finding shall be annulled and a copy of such order shall be filed by the Clerk of said Court with the Supervisor [fol. 29] of Liquor Control, and the Attorney General shall file his further certificate in conformity with such order. Upon an appeal by a complainant who has alleged the existence of the discriminatory laws in any state, and as to whose complaint the Attorney General has found adversely, if the Court finds in favor of the appellant, a mandatory order shall enter requiring the Attorney General to forthwith file his certificate in conformity to such order. (Laws 1937, p. 536, Sec. 3.)

4525h-4. Importation of Alcoholic Liquor from State in Which Discrimination Exists Prohibited.

The transportation or importation into this state, or the purchase, sale, receipt, or possession herein, by any licensee, of any alcoholic liquor manufactured in a 'state in which discrimination exists' is hereby prohibited, and it shall be unlawful for any licensee to transport or import into this state, or to purchase, receive, possess, or sell in this state, any alcoholic liquor manufactured in any 'state in which discrimination exists' as herein defined: Provided, however, that

(a) As to alcoholic liquor manufactured in any state as to which the Attorney General certifies that discriminatory laws exist, where no appeal is taken from his finding, the prohibition of this section shall become effective forty-five (45) days after the publication of the notice provided in Section 2 hereof;

[fol. 30] (b) As to alcoholic liquor manufactured in any state as to which the Attorney General certifies that discriminatory laws exist and an appeal is taken from his finding, the prohibition of this section shall become effective thirty (30) days after the order or judgment of the court or judge, if such finding is affirmed. (Laws 1937, p. 536, Sec. 4.)

4525h-5. Licenses Previously Issued, Effect on

Any license heretofore issued by the Supervisor of Liquor Control under the authority given by the Liquor Control Act passed by the 57th General Assembly, Extra Session, approved January 13, 1934, Laws of Missouri, Extra Session, 1933-34, page 77, and any amendments thereto, or under the provisions of Article 9 of Chapter 93, Revised Statutes of Missouri, 1929, as amended by the 57th General Assembly, approved March 15, 1933, Laws of Missouri, 1933, page 256, and any amendments thereto, shall be deemed to have written therein, and any license issued hereafter under or pursuant to said statutes, shall have written therein the following: 'This license shall not authorize the holder hereof to receive, purchase, possess, or sell any alcoholic liquor manufactured in a "state in which discrimination exists" as defined by the laws of this state, and the holder hereof is prohibited from receiving, purchasing, possessing, or selling any such liquor.' (Laws 1937, p. 536, Sec. 5.)

4525h-6. Revocation of Licenses

The revocation by the Supervisor of Liquor Control of [fol. 31] any license issued under the Liquor Control Act passed by the 57th General Assembly, Extra Session, approved January 13, 1934, Laws of Missouri, Extra Session, 1933-34, page 77, and any amendments thereto, or under the provisions of Article 9 of Chapter 93, Revised Statutes of Missouri, 1929, as amended by the 57th General Assembly, approved March 15, 1933, Laws of Missouri, 1933, page 256, and any amendments thereto, shall, ipso facto, revoke any license issued to said licensee by the proper authority designated by the County Court of any county, or the corresponding authority in the City of St. Louis. The decision of the Supervisor of Liquor Control in revoking any license issued by him for a violation of the provisions of Section 4

hereof shall be final and no right to review or appeal therefrom shall exist. (Laws 1937, p. 536, Sec. 6.)"

[fol. 32] (c) Purporting to act under the supposed authority of said "Discrimination Act", defendant McKittrick has determined that certain of the laws, rules and regulations in force in the Commonwealth of Pennsylvania and in the State of Indiana are discriminatory laws as defined by said "Discrimination Act" and has prepared and filed with defendant Fitzgerald a certificate certifying that said laws, rules and regulations in force in the Commonwealth of Pennsylvania and the State of Indiana are discriminatory within the meaning of said "Discrimination Act". Upon information and belief, defendant Fitzgerald, purporting to act pursuant to the supposed authority of said "Discrimination Act" is forthwith about to give and unless restrained by the order of this Court will forthwith give notice by publication in a newspaper of general circulation in the State of Missouri to all holders of licenses authorizing the sale of any alcoholic liquors in the State of Missouri of the fact that the defendant McKittrick has filed with said defendant Fitzgerald, as required by said "Discrimination Act", a certificate stating that discriminatory laws have been found to exist in the Commonwealth of Pennsylvania and in the State of Indiana, and stating that forty-five (45) days subsequent to the date of said publication of said notice, it will be unlawful to import or trans-[fol. 33] port into the State of Missouri or to purchase, receive, possess or sell in the State of Missouri any alcoholic liquors manufactured in the Commonwealth of Pennsylvania or in the State of Indiana; defendant Fitzgerald is further about to forthwith give and unless restrained by an order of this Court will forthwith give a written notice by mail to each holder of a license authorizing the sale of alcoholic liquors at wholesale within the State of Missouri, in which written notice said defendant Fitzgerald will give the same information contained in the aforesaid newspaper notice and state the name of the newspaper in which said notice will be published; and said defendants, and each of them, unless restrained and enjoined by this Court from so doing will forthwith commence the prosecution of numerous criminal and civil actions against these plaintiffs, their employes and agents, and their customers, and others, to enforce said "Discrimination Act", and will forthwith

otherwise enforce against the plaintiffs and others each and all of the provisions of said "Discrimination Act"; which said certificates are in words and figures, respectively, as follows:

[fol. 34] "This is to certify that we have this 6th day of October, 1937, in compliance with House Bill No. 331 enacted by the 59th General Assembly and found at pages 536 to 543, inclusive, Laws of Missouri, 1937, completed an examination of the laws, rules and regulations pertaining to the purchase, sale, transportation, importation, warehousing, inspection, receipt, and solicitation for sale of alcoholic liquor, of the State of Indiana; and we further certify that the following provisions of the laws, rules and regulations of said state are discriminatory within the meaning of House Bill No. 331, supra, in the particulars hereinafter set out:

"The Alcoholic Beverages Act of 1935 (House Bill No. 399) Chapter 226 of the Acts of the Indiana General Assembly of 1935 as amended by (Senate Bill No. 118) Chapter 197 of the Acts of the Indiana General Assembly of 1937 embodied in the June, 1937 Supplement to Burns Annotated Indiana Statutes, 1933, provides as follows (House Bill 399, Laws of 1935, page 1092):

"Sec. 9. Class "A"—* * *

"Such wholesaler's permit, however, shall not be issued unless and until there be paid by said wholesaler to said administrator a separate license fee therefor of one thousand dollars ($1,000), in cash and there also be filed with the application for a permit a surety bond in the penal sum of two thousand dollars ($2,000), payable to the State of Indiana, to be approved by the commission, conditioned that he will not violate any of the provisions of any law of this state, touching the business carried on by such wholesaler, and that he will not violate any of the rules and regulations of the commission, provided that fifty dollars ($50.00), and no more, may be recovered in any one action by the State of Indiana, against such wholesaler on said bond, for the violation of a rule or regulation of the commission, and no more than one hundred dollars ($100), [fol. 35] may be recovered in any one action by the State of Indiana on said bond, for the violation of any of the provisions of this act, (violations prior to action instituted to be deemed one continuing violation), but, no action or

actions shall be brought upon said bond, except by the State of Indiana, and for the use and benefit of the State of Indiana. (Par. 6.)

* * * * * * *

(Pages 1093-1095:)

"After November 15, 1935, any person holding a permit to wholesale alcoholic malt beverages under this act may (1) by complying with the terms and conditions hereinafter prescribed, apply for and may be granted by the commission, an additional permit to be known as a 'port of entry permit,' which shall, when granted, authorize such wholesaler so applying, to import into the State of Indiana, alcoholic malt beverages which have been manufactured outside of the State of Indiana, and to transport, possess, sell and deliver, such imported alcoholic malt beverages within any county in the State of Indiana, but he may store and keep such imported malt beverages only in the county in which he is authorized to store and keep alcoholic malt beverages under his wholesaler's permit. Such importations, transportation, possession, sale and delivery shall be subject to the rules and regulations of the commission and subject to the same restrictions provided in this act, for persons holding permits to manufacture within the State of Indiana. No holder of a wholesaler's permit shall be qualified for such said additional permit who is disqualified to hold a wholesaler's permit. No such additional permit to import alcoholic malt beverages, however, shall be issued to any wholesaler, unless and until such wholesaler shall have paid a separate additional annual license fee in the sum of fifteen hundred dollars ($1,500) to said administrator and shall have made such a showing as the commission shall require with reference to the ownership and residence and/or ownership of the business and/or stock of such corporation, and, unless and until said wholesaler shall have filed an additional surety bond in the penal sum of ten thousand dollars ($10,000), conditioned that he will not violate any of the provisions of any law of this state, touching the alcoholic traffic or the manufacture, importation, transportation or possession or sale or delivery of alcoholic malt beverages as defined in this act, and/or of the rules and regulations of the commission applicable thereto, and

[fol. 36] that he will account for and pay over all license fees levied under this act, on the products imported and sold or withdrawn for sale by him under such permit, provided that the sum of one hundred dollars ($100), and no more, may be recovered in any one action on said bond, by the State of Indiana against such wholesaler, for the violation of a rule or regulation of the commission or for the violation of any of the provisions of this act (violations prior to action instituted to be deemed one continuing violation), but the full amount of any and all said taxes and license fees due and owing may be recovered by the State of Indiana in any action on said bond. No action or actions shall be brought upon said bond, except by the State of Indiana, and for the use and benefit of the State of Indiana. A beer wholesaler's permit and/or said additional permit as a 'port of entry permit' granted to such wholesaler shall continue for one (1) year only, including the day of issue, and, thereafter, such permit or permits may be issued to the same prior holder thereof or to another applicant therefor, but only in the same manner and upon the same terms and conditions above specified and upon the payment of said special license fees. Not fewer than ten or more than one hundred port of entry permits shall be granted by the commission. (Par. 9.)

(Section 40 (a), pp. 1174-1175:)

"Sec. 40 (a) Alcoholic Malt Beverage License Fees (gallonage). Any authorized manufacturer and/or importing agent, and/or wholesaler invested with the importing privileges (as to imported alcoholic malt beverages), and/or the holder of a dining car permit or of a boat permit, shall pay unto the State of Indiana a license fee of three and one-third (3⅓¢) cents on each gallon of alcoholic malt beverages manufactured or given or sold or withdrawn for sale or gift by him in the State of Indiana, which license fee shall be paid on the first and fifteenth day of each month, on all such beverages so manufactured or sold or given away or withdrawn for sale or gift by him during the preceding half-monthly period. * * * Said license fee is hereby levied in addition to any and all license fees which may have been paid by him at the time of, or as a condition to the granting of any permit, * * *

Bulletin No. 2, Alcoholic Beverage Commision (Indiana), issued November 13, 1935, provides:

[fol. 37] "Each holder of a Port of Entry Permit is hereby required to purchase and keep to supply his trade a minimum of one brand of beer from each of five out of state breweries, which brands shall be handled by him without prejudice in promoting the sale of the same. Any unfair treatment of any one of said brands of five beers shall be construed by the Alcoholic Beverage Commission as an evasion of the provisions of the Alcoholic Beverages Act of 1935, prohibiting non-residents and foreign corporations from owning or controlling ports of entry permittees or the business thereof." (Last paragraph.)

That portion of paragraph 6 of Section 9, Acts of Indiana, supra, which requires a wholesaler to pay a license fee in order to be authorized to import into the State of Indiana alcoholic malt beverages which have been manufactured outside of the State of Indiana, is a discriminatory law within the meaning of Section 1, subsection (7), subdivision (a), of House Bill No. 331, Laws of Missouri, 1937, page 537.

The provision of Section 9, and more particularly that portion of paragraph 6, Acts of Indiana, supra, which provides that a wholesaler of alcoholic malt beverages manufactured within the State of Indiana must pay a $1000 license fee, while it is provided by a portion of paragraph 9, supra, that a wholesaler authorized to import alcoholic malt beverages must pay a $1500 license fee, is discriminatory law within the meaning of Section 1, subsection (7), subdivisions (f), (g) and (h), of House Bill No. 331, Laws of Missouri, 1937, page 538.

The provisions of Section 9, Acts of Indiana, supra, and more particularly that portion of paragraph 6, supra, which provides for the recovery of $50.00, and no more, for the violation of any of the provisions of this act by a wholesaler of alcoholic malt beverages of domestic manufacture [fol. 38] while a portion of paragraph 9, supra, provides for a recovery of $100.00, and no more, for the violation of any of the provisions of this Act by a wholesaler of alcoholic malt beverages manufactured outside of the State, are discriminatory within the meaning of Section 1, subsection

(7), subdivision (i), of House Bill No. 331, Laws of Missouri, 1937, page 538.

That portion of paragraph 9, Section 9, Acts of Indiana, supra, which limits the number of Port of Entry permit holders, is a discriminatory law within the meaning of Section 1, subsection (7), subdivision (h), of House Bill No. 331, Laws of Missouri, 1937, page 538.

The provisions of Section 40, Acts of Indiana, supra, which imposes a gallonage tax upon duly authorized importers who sell or otherwise dispose of within the State of Indiana alcoholic malt beverages manufactured outside of the State, are discriminatory within the meaning of Section 1, subsection (7), subdivisions (f), (g), and (h), of House Bill No. 331, Laws of Missouri, 1937, page 538.

The last paragraph of Bulletin No. 2, supra, issued November 13, 1935, is discriminatory law within the definition of Section 1, subsection (7), subdivision (h), of House Bill No. 331, Laws of Missouri, 1937, page 538.

Respectfully submitted, (Signed) Roy McKittrick, Attorney-General; (Signed) Aubrey R. Hammett, Jr., Assistant Attorney-General.

[fol. 39] "This is to certify that we have this 6th day of October, 1937, in compliance with House Bill No. 331 enacted by the 59th General Assembly and found at pages 536 to 543, inclusive, Laws of Missouri, 19[illegible], completed an examination of the laws, rules and regulations pertaining to the purchase, sale, transportation, importation, warehousing, inspection, receipt, and solicitation for sale of alcoholic liquor, of the State of Pennsylvania: and we further certify that the following provisions of the laws, rules and regulations of said state are discriminatory within the meaning of House Bill No. 331, supra, in the particulars hereinafter set out:

The Pennsylvania Liquor Laws, as amended, embodied in Title 47, Purdon's Pennsylvania Statutes, 1936 Compact Edition, as amended, (based upon and identical with Purdon's Pennsylvania Statutes Annotated, Permanent Edition) provide as follows:

'Sec. 100b. License fees; distribution of revenue. No license shall be issued to any manufacturer, distributor, importing distributor or retail dispenser until the licensee

shall have first paid an annnual license fee for such grant as follows:

* * * * * * *

'(b) In case of a distributor, the license fee shall be four hundred ($400.00) dollars, * * *.

Se-. 744-415. The board may, upon application, grant to [fol. 40] responsible persons of good reputation importers' licenses, such licenses shall permit the holders thereof to bring or import liquor from other states, foreign countries, peninsular possessions of the United States, and obtain tax paid liquor from manufacturers located within the commonwealth to be sold outside of this commonwealth and exclusively to Pennsylvania liquor stores within this commonwealth.

'The fee for such licenses shall be $100.00 per annum, and, before any such license shall be granted, the applicant shall file with the board a bond in the sum of $10,000.00, conditioned for the faithful observance by the licensee of all of the laws of this commonwealth and the regulations of the board relating to the distribution, sale, and use of liquor, malt or brewed beverages, alcohol or other alcoholic beverages.

'Sec. 747. Imposition of Tax. (a) * * * every manufacturer shall be subject to pay to the Commonwealth of Pennsylvania the taxes imposed in this section for the privilege of producing, manufacturing, distilling, rectifying or compounding distilled spirits, rectified spirits or wines in this Commonwealth. * * * (Par. 1.)

'Such Taxes * * * shall be computed thereon at the following rates: (Par. 2.)

* * * * * * *

'On rectified spirits, thirty cents ($.30) per proof gallon, or wine gallon when below proof, * * * in addition to the tax imposed herein on the privilege of manufacturing, or producing, using or selling within the Commonwealth the distilled spirits or wines from which said rectified spirits are produced, manufactured or compounded. (Par. 4.)

'(b) * * * every importer shall be subject to pay to the Commonwealth of Pennsylvania the taxes imposed in

this section for the privilege of selling or using in this Commonwealth distilled spirits, rectified spirits, or wines [fol. 41] brought into this Commonwealth. Such taxes * * * shall be computed thereon at the following rates: (Par. 7.)

* * * * * * *

'On rectified spirits, one dollar and thirty cents ($1.30) per proof gallon or wine gallon when below proof, * * * (Par. 9).'

Regulation No. 51, Promulgated July 25, 1935, Pennsylvania Liquor Control Board, provides as follows:

'Sec. 1. Except as hereinafter provided, every person holding a Malt Liquor Distributor's License issued by the respective County Treasurers of this Commonwealth shall, not later than August 10, 1935, file with the Pennsylvania Liquor Control Board an application for a Malt of Brewed Beverage Distributor's or Importing Distributor's License on forms furnished by the Board, together with a surety bond in the amount of One Thousand ($1,000.00) Dollars in case of Distributor and in case of an Importing Distributor in the amount of Two Thousand ($2,000.00) Dollars, an application fee of Ten ($10.00) dollars and a license fee calculated from July 1, 1935 at the rate of Thirty-three and 33/100 ($33.33) Dollars in the case of a Distributor and in the case of an Importing Distributor at the rate of Seventy-five ($75.00) Dollars for each month the license will be in force in the particular license district fixed by the Board, in which the Distributor's or Importing Distributor's place of business is located, less a credit for the used portion of the fee paid by the Distributor to the County Treasurer for such license calculated on a monthly basis from July 1, 1935.'

Section 100b, Pennsylvania Liquor Laws, supra, and Regulation No. 51, supra, which provide for a payment of a $400.00 license fee for a distributor and a $900.00 license fee for an importing distributor, are discriminatory within [fol. 42] the terms of Section 1, subsection (7), subdivisions (f), (g) and (h), of House Bill No. 331, Laws of Missouri, 1937, page 538.

Section 744-415, Pennsylvania Liquor Laws, supra, insofar as it imposes a license fee upon the right to import

alcoholic beverages, is discriminatory within the meaning of Section 1, subsection (7), subdivision (a), of House Bill No. 331, Laws of Missouri, 1937, page 537.

Section 747, Pennsylvania Liquor Laws, supra, insofar as it imposes a thirty cents gallonage tax on rectified spirits of domestic manufacture while it imposes a $1.30 tax on imported rectified spirits, is discriminatory law within one meaning of Section 1, subsection (7), subdivisions (f), (g) and (h), of House Bill No. 331, Laws of Missouri, 1937, page 538.

Respectfully submitted, (Signed) Roy McKittrick, Attorney General; (Signed) Aubrey B. Hammett, Jr., Assistant Attorney General."

[fol. 43] There are numerous persons, firms and corporations, citizens of Missouri and other states, who are manufacturers, in Missouri, of alcoholic liquor within the meaning of the 'Discrimination Act.'

The plants in Missouri where malt alcoholic liquors, within the meaning of said Act, are manufactured, represent a large permanent investment, produce large quantities of said malt alcoholic liquors, employ many employees, operate, in many cases, with substantial profits, and constitute one of the most important industries carried on within the State of Missouri. Said malt alcoholic liquors so manufactured in Missouri are well known and sold in large quantities throughout the United States, including the states mentioned herein, and by reason of the quality of the same, the expenditure of a vast amount of money in advertising and solicitation in said states, and the expenditure therein of a vast amount of time and effort in soliciting and in developing a distribution system thereof, said Missouri manufacturers have built up and developed in said states a great and extensive demand for their said malt alcoholic liquors and valuable good will and sales and distribution systems for the same.

There are in Missouri only six distilleries, with a total combined capacity of approximately seventy-five barrels of alcoholic liquor per day, and their present production could only supply a small fraction of the present demand for distilled spirits within the State of Missouri. Some of said distilled liquor so manufactured in Missouri is sold in other states.

[fol. 44] There is in Missouri one plant in which alcoholic liquor within the meaning of said Act, commonly called champagne, is manufactured. Said champagne is manufactured in said plant in large quantities, is well known, and sold in large quantities throughout the United States, including the states mentioned herein, and by reason of the quality of the same, the expenditure of a large amount of money in advertising and solicitation in said states, and the expenditure therein of a large amount of time and effort in soliciting and in developing a distribution system thereof, the manufacturers of said champagne have built up and developed in said states an extensive demand for their product, and valuable good will and sales and distribution systems.

There are several small plants in Missouri where fermented alcoholic liquor, within the meaning of said Act, commonly called wine, is produced from grapes.

There are several large plants in Missouri, with large volumes of sales, in which fermented alcoholic liquors, commonly known as wine, are fortified or blended, and are bottled and placed in original packages. Some of said wines are sold outside the State of Missouri.

There are in Missouri several large plants in which spirituous alcoholic liquors, within the meaning of said 'Discrimination Act', including the kind mentioned in this petition, are rectified, mixed, blended, bottled and placed in original packages. The majority of the whiskey which is so rectified, is manufactured outside the State of Missouri. The usual process by which the corporations owning said plants prepare their products for sale is by purchasing whiskey or other spirituous liquors in bulk, reducing the proof thereof by the addition of distilled water, sometimes blending different whiskeys or other spirituous liquors by [fol. 45] mixing same, and bottling the product for sale in original packages. The plants in Missouri where said alcoholic liquors are handled as in this paragraph described, represent a substantial permanent investment, and large quantities of alcoholic liquors so handled therein are sold both in this state and in other states.

The phrase 'alcoholic liquor' as defined by Section 2 of an Act of the 57th General Assembly, Extra Session, ap-

proved January 17, 1934, Laws of Missouri, Extra Session 1933-1934, pages 78-79, is defined as follows :

'Section 2. * * * The Supervisor of Liquor Control shall issue licenses for the manufacture and sale of ardent spirits, malt, vinous, fermented and every class of liquors used as beverages and having an alcoholic content in excess of three and two-tenths (3.2) per cent by weight.'

Section 17 of said Act, Laws of Missouri, Extra Session 1933-34, page 83, is as follows:

'Definition of 'intoxicating liquor'.—The term 'intoxicating liquor' as used in this act, shall mean and include alcohol for beverage purposes, alcoholic, spirituous, vinous, fermented, malt or other liquors, or combination of liquors, a part of which is spirituous, vinous, or fermented, and all preparations or mixtures for beverage purposes, containing in excess of three and two-tenths (3.2) per cent of alcohol by weight.'

Section 1 of an act relating to the manufacture and sale of malt beverages for export and sale outside the State, Laws of Missouri, Extra Session, 1933-34, page 95, is as follows:

'*Legalising malt beverages containing 5 per cent alcohol.*—From and after the effective date of this act it shall be lawful for any person, partnership or corporation engaged in the brewing or manufacture of beer or other malt liquors made from pure hops, or pure extract of hops, or pure barley malt, or other wholesome grains, to manufacture in the State of Missouri, such beverage to be exported from this State and sold outside of the State. Such beverage to contain alcohol in excess of 3.2 per cent by weight, but not in excess of 5 per cent by weight.'

Section 1 of an Act relating to the manufacture and sale of beverages containing in excess of 3.2 per cent for sale outside of State. Laws of Missouri, Extra Session, 1933-34, page 96, is as follows:

'Legalising manufacture and sale.—From and after the effective date of this act it shall be lawful for any person, [fol. 46] partnership or corporation engaged in the manufacture, and/or wholesale selling and distributing of beverage liquors containing alcohol in excess of 3.2 per cent, to

manufacture in the State of Missouri and/or to export such beverage liquors outside of this State to be sold outside of the State.'

"Section 13139-A of an Act of the 57th General Assembly, Regular Session, approved March 15, 1933, Laws of Missouri, 1933, page 257, defining non-intoxicating beer, is as follows:

'Legalising manufacture, sale and transportation—prescribing alcoholic content.—Beer having an alcoholic content of not less than one-half of one per cent by volume not exceeding 3.2 per cent by weight, is hereby declared to be non-intoxicating beer, and may be lawfully manufactured and sold, or sold, in this State by any holder of a permit issued by the Food and Drug Commissioner of this State, authorizing such manufacture, and sale, or sale, and may be lawfully transported, sold and consumed in this state, and may be lawfully shipped into, or out of, this state subject to such inspection fees, and/or taxes, and under such regulations as may be provided by law, * * *'.

"Plaintiffs have complied with all laws of the State of Missouri relative to foreign corporations doing business within said State, except the Discrimination Act here in controversy, and have also complied with all other laws of the State of Missouri, except the Discrimination Act here in controversy, and with all of the laws of the United States of America, concerning their right to manufacture alcoholic liquors, and in pursuance of their permits and licenses to engage in and transact business within the State of Missouri, the plaintiffs have been engaged therein for the past several years, which said business is a property right within Section 1 of Article XIV of the Amendment to the Constitution of the United States, which provides:

'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'

"Said Missouri 'Discrimination Act' is unconstitutional and void under Sec. 1, of Article XIV, Amendments of the

Constitution of the United States, because it classifies manufacturers, brewers, fermenters, distillers, rectifiers, wine makers, blenders, processors, bottlers, or persons who fill or refill an original package, and others engaged in brewing, fermenting, distilling, rectifying, or bottling alcoholic liquor, into one group or classification, and then in effect divides the classification into various unreasonable, arbitrary and unnatural distinctions and groups, namely: [fol. 47]

(a) Those persons, firms or corporations domiciled, incorporated and manufacturing alcoholic liquors in foreign states for sale and importation into Missouri and other states, in which no 'discrimination' has been found or certified by the Attorney-General to exist, the same being the States of Illinois, Maryland, Kentucky and many other states;

(b) Those persons, firms or corporations domiciled, incorporated and manufacturing alcoholic liquors in foreign states for sale and importation into Missouri and other states, in which state 'discrimination' has been found and certified by the Attorney General to exist;

(c) Those persons, firms and corporations domiciled, incorporated and manufacturing alcoholic liquors in foreign states for sale and importation into Missouri and other states, in which 'discrimination' has been found and certified by the Attorney General to exist, whether the alcoholic liquor manufactured in said 'discriminatory' state is actually sold in competition with alcoholic products and commodities manufactured in Missouri:

(d) Those persons, firms and corporations domiciled, incorporated and manufacturing alcoholic liquors in foreign states for sale and importation into Missouri and other states, engaged in selling non-intoxicating liquors and beers in the State of Missouri, and in foreign states, who import and transport same into Missouri without any regulation or restraint, because no 'discrimination' has been certified to exist within their respective states; and those transporting and importing the same commodities of equal quantity from states in which said 'discrimination' has been found and certified by the Attorney General to exist.

(e) Those who sell only alcoholic liquors manufactured in Missouri are not adversely affected by said 'Dis- [fol. 48]

crimination Act' while those who import liquor from Pennsylvania and Indiana and other states of equal quality cannot sell it within the State of Missouri because the Attorney General has certified that such states have discriminatory laws;

(f) Those persons, firms or corporations domiciled in the State of Missouri owning liquors manufactured or distilled in states in which 'discrimination' has been found to exist, and now having same for sale in the State of Missouri, or engaged in selling in the State of Missouri alcoholic liquors produced, manufactured or distilled in states in which 'discrimination' has been found to exist;

(g) Those persons, firms or corporations domiciled in the State of Missouri, who own intoxicating liquor manufactured, produced or distilled in states in which no 'discrimination' has been found to exist.

"Under Section 1 of Amendment to Article XIV of the Constitution of the United States, which provides that no state 'shall deprive any person of life, liberty or property without due process of law, or deny to any person within its jurisdiction the equal protection of the law', plaintiffs are entitled in Missouri to the same protection of equal laws that natural persons within its jurisdiction have a right to demand under like circumstances, and that since the 'Discrimination Act' in question discriminates between those defined as manufacturers, under Section 2 thereof, located within the State of Missouri, and those foreign manufacturers located without the State of Missouri, but who are permitted to import free from the effect of said 'Discrimination Act' alcoholic beverages into the State of Missouri, and because no 'discrimination' has been certified or found by the Attorney General of the State of Missouri to exist within their respective states, namely the states of Illinois, Maryland and Kentucky, and other states, and with those located [fol. 49] without the State but who are not permitted to import alcoholic liquors into the State of Missouri because the Attorney General has found and certified that 'discrimination' exists within their respective states. Said 'Discrimination Act' does not have any real, substantial or reasonable relation to the regulation or control of the liquor traffic within the State of Missouri; that the same does not have

any real, substantial, natural or necessary relation to the promotion of the public health, safety, morals, good order, or general public welfare, since the alcoholic liquors manufactured by plaintiffs are of the same kind, quality, purity and goodness as those manufactured within the State of Missouri, and those which are now being imported free from restraint of such 'Discrimination Act' from other states into the State of Missouri, by manufacturers in Illinois, Maryland, and Kentucky and other states engaged in the same business as plaintiffs, and therefore the classification distinction and discrimination between manufacturers of alcoholic liquors as herein set forth, and as provided in said 'Discrimination Act' forbidding, prohibiting and excluding imports of like kind of manufacturers engaged in the same business, is not justified or warranted by any real and substantial difference, having a reasonable relation to the subject of said legislation, and since the classification as to manufacturers all of whom are similarly situated, with respect to liquor products and commodities manufactured, imported and sold by them, the division thereof into separate and distinct classes, although under said Act they are classified as one single group, is unreasonable, unlawful, arbitrary, artificial, evasive, oppressive, capricious and discriminatory both as to persons within and without the jurisdiction of the State of Missouri, and as to persons without said State engaged in manufacture thereof, and as to lawful alcoholic commodities, products and merchandise produced outside of said State, similar in every respect as to kind, quality, purity and goodness, and which are entitled under the equal protection clause of Section 1, Article XIV of the Amend-
[fol. 50] ments to the Constitution of the United States, to be used, delivered and imported into and sold within the State of Missouri, and thereby said Missouri 'Discrimination Act' imposes unreasonable burdens, restraints and liabilities upon plaintiffs and others which are not cast upon other similarly situated, in violation of said Section 1, Article XIV of the Amendments to the Constitution of the United States.

Said Missouri 'Discrimination Act' is in conflict with, contrary to and violates Section 1 of Article XIV of the Amendments to the Constitution of the United States, which provides:

'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the

United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'

in that the same fails to apply equally to persons or corporations within the State of Missouri, and to persons and corporations domiciled in foreign states, but lawfully authorized to transact business within the State of Missouri, all of whom are similarly situated and engaged in similar business and occupations; and in that the same confiscates and destroys the property, business and liberty of contract of plaintiffs and others similarly situated without due process of law as guaranteed thereby; and since the plaintiffs have no power or control over the legislative department of the Commonwealth of Pennsylvania and the State of Indiana, or other such states, with respect to the enactment, policy or repeal of their laws, and because the Legislative Department of the State of Missouri has attempted to and has by said 'Discrimination Act' exercised extra-territorial legislative powers and jurisdiction over the Commonwealth of Pennsylvania and the State of Indiana, and other states by prescribing conditions with reference to control of liquor traffic in Pennsylvania, Indiana and other states, and as to the use, sale, delivery and importation of liquor products from the Commonwealth of Pennsylvania and the State of Indiana and other states into the State of Missouri, it is [fol. 51] obviously impossible for said plaintiffs to comply with the provisions of the Missouri 'Discrimination Act', and hence the same is unlawful, unreasonable, capricious, arbitrary, oppressive and discriminatory as to plaintiff.

"The Missouri 'Discrimination Act' is unconstitutional and void under the first section of the XIV Amendment to the Constitution of the United States, which provides:

'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'

because the discrimination prohibiting, forbidding and excluding Indiana and Commonwealth of Pennsylvania alcoholic products and commodities from importation, delivery and use in the State of Missouri is effective, even though the alleged discriminatory laws of the Commonwealth of Pennsylvania, Indiana and sister states are lawful and reasonable, and do not exclude, forbid or prohibit the importation, use and delivery of alcoholic products and commodities manufactured in Missouri and other states into the Commonwealth of Pennsylvania and State of Indiana.

"The 'Discrimination Act' of Missouri also contravenes, conflicts with and violates said Section 1 of the XIV Amendment to the Constitution of the United States, which provides:

'All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges of immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'

because the unlawful, unreasonable and arbitrary discrimination prescribed thereby between citizens of Missouri and citizens of the Commonwealth of Pennsylvania, State of Indiana, and other such states, and between the alcoholic products and commodities manufactured by them in the [fol. 52] Commonwealth of Pennsylvania, State of Indiana and other such states, and all others engaged in the liquor industry, and between liquor commodities of similar and equal quality and purity, is of such character and is burdened with such conditions as will prevent and prohibit altogether the importation, use, delivery or introduction into Missouri by Pennsylvania and Indiana manufacturers and dealers of alcoholic liquors and those of other such states of the same kind, quality and purity, as that produced in Missouri."

There are many citizens of the State of Missouri whose livelihood now depends on employment in Missouri in the various stages of the manufacture of alcoholic liquors within the meaning of the Discrimination Act.

The Missouri Liquor Licenses of plaintiffs which were in force at the time of the filing of the petition herein, bear on the fact thereof an expiration date of September 6, 1938.

Plaintiffs have not been admitted as foreign corporations to do business in the State of Missouri and are not registered with the Secretary of State of Missouri as foreign corporations licensed to do business in the State of Missouri. Plaintiffs do no intrastate business in Missouri.

(d) There are numerous other states in the United States, including Illinois, Maryland, and Kentucky, which have not been certified by defendant McKittrick as having laws, rules and regulations discriminating against intoxicating liquor manufactured in the State of Missouri and in which said States there are numerous persons and corporations engaged [fol. 53] in the manufacture of intoxicating liquors who sell their products throughout the United States wherever such sale is lawful, including the State of Missouri. Said manufacturers will be free to continue to import and sell within the State of Missouri such alcoholic liquors, including gins and whiskeys, which said products have been and are now in competition with those manufactured and sold by plaintiffs within the State of Missouri.

(e) Said "Discrimination Act" is in violation of the Constitution of the United States and therefore invalid and void for the following reasons:

(First.) Said "Discrimination Act" violates Section 8 of Article I of the Constitution of the United States, which, among other things, provides: "The Congress shall have the power * * * to regulate commerce * * * among the several States * * *", because said "Discrimination Act" is an attempt by the State of Missouri to regulate and prohibit interstate commerce and constitutes an undue burden on interstate commerce, and because the State of Missouri has, by said "Discrimination Act", usurped the power of the Federal Congress over interstate commerce, and because said "Discrimination Act" is not uniform in its operation upon interstate commerce, and because said "Discrimination Act" provides that the importation into or receipt, possession or sale in Missouri of alcoholic beverages manufactured in Pennsylvania or in Indiana is prohibited, while the importation into and sale in Missouri of alcoholic liquors manufactured in other States, such as Illinois, Kentucky and [fol. 54] Maryland, is permitted by said "Discrimination Act", and because said "Discrimination Act" arbitrarily makes classifications without any reasonable or justifiable basis therefor, as herein set out, and because said "Dis-

crimination Act" is an unreasonable exercise of the police power, since said "Discrimination Act" is not designed to promote any purpose of or to protect public health, morals, welfare or safety. The Twenty-First Amendment to the Constitution of the United States, which among other things provides, "The transportation or importation into any state, territory or possession of the United States for delivery or use therein of intoxicating liquors in violation of the laws thereof is hereby prohibited", was intended only to protect those States which prohibit or restrict the manufacture, sale, use and possession of intoxicating liquors, and was not intended to take from the Federal Congress jurisdiction over interstate commerce in intoxicating liquors between such States as have by their laws made intoxicating liquor a lawful commodity.

(Second.) Said "Discrimination Act" violates Section 10 of Article I of the Constitution of the United States, which, among other things, provides: "No State shall * * * pass any ex post facto law or law impairing the obligation of contracts", in that said "Discrimination Act" makes the possession of alcoholic liquors lawfully acquired and possessed unlawful and is retroactive in its operation upon such alcoholic liquors, and in that said "Discrimination Act" impairs the obligation of plaintiffs' contracts with their employes and agents respecting the importation into and sale of plaintiffs' products in the State of Missouri, since said "Discrimination Act" renders performance of such contracts as ap-
[fol. 55] plied to the State of Missouri illegal.

(Third.) Said "Discrimination Act" violates Section 2 of Article IV of the Constitution of the United States, which, among other things, provides: "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States", because said "Discrimination Act" and its operation deny to the plaintiff Finch as a citizen and resident of the Commonwealth of Pennsylvania, and to the plaintiff Quaker as a citizen and resident of the State of Maryland, and to the plaintiff Distributors as a citizen and resident of the State of New York, the privileges and immunities which are enjoyed in the State of Missouri by citizens of other States, such as the States of Illinois, Kentucky, Maryland, and because said "Discrimination Act" thereby constitutes legislation which discriminates against plaintiffs, in violation of their constitutional rights,

and because said "Discrimination Act" creates and constitutes classes and distinctions without any reasonable or justifiable basis therefor, as herein set out, and because the purpose of said "Discrimination Act" is not to promote any purpose of public health, morals, welfare or safety in the State of Missouri, but is designed and calculated to retaliate against citizens of those States wherein laws discriminating against alcoholic liquors manufactured in Missouri have been passed.

(Fourth.) Said "Discrimination Act" violates the Fourteenth Amendment to the Constitution of the United States, which, among other things, provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law", in that the passage and enforcement of said "Discrimination Act" against plaintiffs will destroy plaintiffs' business in Missouri, as aforesaid, and [fol. 56] thereby deprive plaintiffs of their property without due process of law, and thereby confiscate plaintiffs' property in Missouri. Said "Discrimination Act" does not constitute due process of law because said "Discrimination Act" is not general in its operation, but operates only against the importation of alcoholic liquors and only against the importation of alcoholic liquors from States certified by the Attorney General of the State of Missouri as having laws, rules or regulations discriminating against alcoholic products produced in the State of Missouri, and because said "Discrimination Act" constitutes class legislation, as herein set out, and because said "Discrimination Act" destroys plaintiffs' rights to make contracts without any reasonable basis, and because said "Discrimination Act" destroys plaintiffs' rights to enforce contracts already made without any reasonable basis, and because said "Discrimination Act" deprives plaintiffs of their right to acquire and possess property, and because said "Discrimination Act" makes unreasonable classifications, and because said "Discrimination Act" makes possession or sale of merchandise, previously lawful to possess and sell, unlawful, and because said "Discrimination Act" confiscates and destroys plaintiffs' property by legislative enactment, and because said "Discrimination Act" makes any place in Missouri where alcoholic liquors manufactured in Pennsylvania or Indiana

are received, possessed or sold, a nuisance, whereas such [fol. 57] places do not and will not constitute nuisances as a matter of fact, and because said "Discrimination Act" confiscates and destroys plaintiffs' property and rights without a trial or a hearing and without employing any method of judicial procedure, and because said "Discrimination Act" makes importation into the State of Missouri and possession in the State of Missouri of plaintiffs' products unlawful, regardless of intent, and because said "Discrimination Act" delegates judicial powers to the Attorney General of the State of Missouri, who is not a judicial officer, and because said "Discrimination Act" authorizes the Attorney General of the State of Missouri to make findings of fact and law which operate upon plaintiffs' rights and plaintiffs' property without giving any previous notice to plaintiffs, and without extending to plaintiffs the opportunity of a hearing, and because said "Discrimination Act" delegates legislative powers to the Attorney General of the State of Missouri and the Supervisor of Liquor Control of the State of Missouri, neither of whom are legislative officers, and because said "Discrimination Act" delegates the legislative power of the State of Missouri to the law-making bodies of the several other States of the United States, since the law-making bodies of such other States can, by passing or repealing laws in such other States, make acts in the State of Missouri lawful or unlawful, and because said "Discrimination Act" infringes and usurps the sovereign power of the several other States of the United States to construe and interpret their own laws, rules and [fol. 58] regulations and to determine the validity and effect of the same, and because said "Discrimination Act" creates classifications between citizens and residents of the State of Missouri offering for sale, receiving or possessing alcoholic liquors manufactured in the Commonwealth of Pennsylvania or in the State of Indiana, and other citizens and residents of the State of Missouri offering for sale, receiving or possessing alcoholic liquors manufactured in other States, such as Illinois, Maryland and Kentucky, and because said "Discrimination Act" takes and confiscates plaintiffs' property in the State of Missouri without any compensation to plaintiffs.

(Fifth.) Said "Discrimination Act" violates the Fourteenth Amendment to the Constitution of the United States,

which provides: "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws", in that said "Discrimination Act" constitutes a law which abridges the privileges and immunities of plaintiff Finch as a citizen of the United States and of the Commonwealth of Pennsylvania, of plaintiff Quaker as a citizen of the United States and of the State of Maryland, of plaintiff Distributors as a citizen of the United States and of the State of New York, in this, that said "Discrimi-
[fol. 59] nation Act" abridges and destroys the rights of said plaintiffs to continue to conduct their business of manufacturing alcoholic liquors in the Commonwealth of Pennsylvania and in the State of Indiana and transporting same into the State of Missouri for sale and use in said State, which said right, privilege and immunity is possessed by citizens of other States, such as the States of Illinois, Maryland and Kentucky, and in this, that said "Discrimination Act" deprives plaintiffs of their property without due process of law for the reasons aforesaid, and in that said "Discrimination Act" denies to plaintiffs the equal protection of the laws, in that it creates unreasonable classifications and distinctions as aforesaid, and in that said "Discrimination Act" creates a special privilege, right, immunity and benefit for the citizens of such other States as Illinois, Maryland and Kentucky, who are engaged in the manufacture of alcoholic liquors in such other States and the transportation of such alcoholic liquors into the State of Missouri for the purpose of sale and distribution in the State of Missouri.

(f) In the Commonwealth of Pennsylvania and in the State of Indiana there are numerous other manufacturers [fol. 60] in alcoholic liquors who are in a situation similar to that of plaintiffs, and plaintiffs bring this action on behalf of such others so similarly situated, as well as themselves, and the granting of an injunction by this Court against the enforcement of said "Discrimination Act" will prevent a multiplicity of suits and prosecutions which will

otherwise arise in connection with the enforcement of said Act.

(g) Defendants, and each of them, unless restrained and enjoined by this Court from so doing, will enforce against plaintiffs, and others, each and all the provisions of said "Discrimination Act" and cause the plaintiffs great and irreparable damage and injury and result in the complete destruction and loss of plaintiffs' business in the State of Missouri.

[fol. 61] IV

(a) Plaintiffs have no adequate remedy at law and unless plaintiffs are afforded the protection which only a court of equity can afford, plaintiffs will be exposed to a multiplicity of suits, complaints and prosecutions, and will lose their customers in the State of Missouri, due to the fact that such persons as are now handling alcoholic liquors manufactured by plaintiffs for sale in the State of Missouri will cease handling plaintiffs' products because of fear of prosecution, and plaintiffs' good will in the State of Missouri will be destroyed, and plaintiffs' reputation and credit in the State of Missouri will be destroyed, and plaintiffs' reputation and credit elsewhere will be damaged, and plaintiffs' distribution system in the State of Missouri will be destroyed, and plaintiffs' reputation will be damaged by reason of the institution of prosecutions and complaints, even if same are terminated favorably to plaintiffs, and the demand in the State of Missouri for alcoholic liquors manufactured by plaintiff Finch in the Commonwealth of Pennsylvania, and by plaintiff Quaker in the State of Indiana will immediately be destroyed and no further purchases of said alcoholic liquors will be made by purchasers for resale within the State of Missouri, and plaintiffs will suffer injuries, damage and losses which would not be subject to accurate and correct computation [fol. 62] and would not be recoverable from any persons responsible therefor, and which damages could not be recompensed by money, and plaintiffs will be compelled to submit to trespasses and invasions of the rights guaranteed to plaintiffs under the before mentioned provisions of the Constitution of the United States.

(b) In order to protect plaintiffs' rights and property in the premises, a temporary restraining order should be

issued immediately, restraining defendant Fitzgerald from publishing and giving the notice aforementioned and restraining defendants from otherwise enforcing said "Discrimination Act", because the giving and publication of said notice by the defendant Fitzgerald and the enforcement of said "Discrimination Act" otherwise by defendants will occur before due notice of this proceeding could be given or a hearing had thereon, and plaintiffs will thereby immediately suffer the irreparable loss, injury and damage aforesaid.

Wherefore, plaintiffs pray:

1. That writs of subpoena be issued, directed to defendants herein, requiring them to appear and make full, true and complete answer to this bill of complaint, but not under oath (answers under oath being expressly waived), and to abide by and perform such orders and decrees as the Court may make in the premises.

[fol. 63] 2. That the said "Discrimination Act" be declared, adjudged and decreed to be void because contrary to the rights of plaintiffs under the Constitution of the United States, as hereinabove set forth.

3. That the defendants, and each of them, their respective appointees, assistants and employes and successors, and each of them, be enjoined from in any way or manner enforcing against these plaintiffs and other- similarly situated the provisions of the said "Discrimination Act" or any part or parts thereof.

4. That inasmuch as the plaintiffs have no adequate remedy at law, and to the end that plaintiffs may not suffer an immediate, great and irreparable loss, the plaintiffs pray that defendant Thomas F. Fitzgerald, his appointees, assistants and employes and successors, and each of them, be enjoined from giving the notice or notices specified to be given by him by Section 2 of said "Discrimination Act" and from publishing in a newspaper or newspapers the name of the Commonwealth of Pennsylvania and of the State of Indiana as States which have been found by the defendant Roy McKittrick to have discriminatory laws, rules and regulations within the meaning of said "Discrimination Act"; and until the hearing and determination of the application for an interlocutory injunction as aforesaid, this

[fol. 64] Honorable Court issue its temporary restraining order restraining said defendants, their respective appointees, assistants and employes from in any manner enforcing or attempting to enforce against these plaintiffs any of the provisions of the said "Discrimination Act"; and that upon the final hearing of this cause said interlocutory injunction be made permanent.

5. For such other and further relief as in the premises may be just.

James P. Aylward, George V. Aylward, Terence M. O'Brien, Attorneys for Plaintiffs.

[fol. 65] *Duly sworn to by Ralph T. Heymsfeld. Jurat omitted in printing.*

[fol. 66] IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed December 10, 1938

Come now defendants and move the Court to dismiss the bill of complaint herein for the reason and upon the ground that said bill of complaint fails to state facts sufficient to constitute a valid cause of action in equity, or to entitle plaintiffs to the relief in equity therein sought.

Roy McKittrick, Attorney General of the State of Missouri, (Signed) Roy McKittrick, Edward H. Miller, Assistant Attorneys General, Solicitors for Defendants.

[fol. 67] IN UNITED STATES DISTRICT COURT

ORDER EMPANELLING THREE-JUDGE COURT—October 20, 1937

Upon the application of plaintiffs in the above entitled cause, presented for a temporary restraining order to the Honorable J. C. Collet, Judge of the United States District Court, and it having been decided that a three-judge Court should be empanelled, pursuant to Section 266 of the Judicial Code (as amended), the Honorable J. W. Woodrough, Circuit Judge, the Honorable Merrill E. Otis, District Judge and the Honorable J. C. Collet, District Judge, are hereby designated to hear and determine said application.

[fol. 68] IN UNITED STATES DISTRICT COURT

STIPULATION CONSOLIDATING CAUSES, ETC.—Filed January 8, 1938

It Is Hereby Stipulated by and between the plaintiffs in each of the above entitled causes and the defendants in each of the above entitled causes, as follows:

First. Inasmuch as each of the above are causes of a like nature and relate to the same questions, these cases may be consolidated for all purposes, including hearing, consideration, decision, determination and review.

Second. At the same time the Court hears and determines the application for an interlocutory injunction, it shall also finally hear and determine these causes, and enter its final decree.

(Signed) James P. Aylward, George V. Aylward, Terence M. O'Brien, Attorneys for Plaintiffs in each of the Above-entitled Causes. (Signed) Roy McKittrick, Edward H. Miller, Attorneys for Defendants in Each of the Above-Entitled Causes.

[fol. 69] IN UNITED STATES DISTRICT COURT

ORDER OF SUBMISSION—January 10, 1938

The above entitled cause being submitted to the Court upon plaintiffs' application for interlocutory and permanent injunction and defendants' motion to dismiss bill of complaint, and the Court having heard the arguments of counsel and having examined the pleadings, said matters are taken under advisement by the Court and the parties hereby ordered to submit their briefs.

[fol. 70] IN UNITED STATES DISTRICT COURT

DECREE—Filed March 16, 1938

These causes having come on for hearing as a consolidated cause, pursuant to stipulation of the parties that said causes should be consolidated for all purposes including hearing,

consideration, decision, determination and review, on January 10, 1938, before the Honorable J. W. Woodrough, United States Circuit Judge, the Honorable Merrill E. Otis, District Judge of the Western District of Missouri, Central Division, and the Honorable John C. Collet, District Judge for the State of Missouri, sitting in said Western District of Missouri, Central Division, sitting as a three judge District Court, duly convened pursuant to the provisions of Section 266, as amended, of the United States Judicial Code, on the several petitions of plaintiffs praying for a temporary and permanent injunction against the defendants from enforcing the provisions of an act of the Legislature of Missouri, contained at pages 536 to 543, both inclusive, of the Laws of Missouri, 1938, being an act entitled "'An Act prohibiting licensees from transporting or importing into this state, purchasing, receiving, possessing and selling intoxicating liquor and non-intoxicating beer manufactured or bottled in any state, the laws, rules or regulations of which discriminate against intoxicating liquor or non-intoxicating beer manufactured in this state or against those selling or dealing therein, defining discriminatory laws and prescribing the duties of the Attorney General with [fol. 71] respect to determining the existence of the discriminations and providing for an appeal from his finding; prescribing the duties of the Supervisor of Liquor Control with respect to the enforcement of this act and providing for the revocation of licenses for a violation of this act'', and defendant's motions to dismiss said petitions, and the causes having been duly heard and submitted as a consolidated cause before said three-judge court on said motions to dismiss said petitions and the argument of counsel thereon, and on the stipuations of the respective parties that said several causes should be taken as submitted, and finally heard and determined, and final decree entered therein, upon the pleadings as aforesaid, and the Court now being fully advised in the premises it is

Ordered, Adjudged and Decreed, That said Act of the Legislature of Missouri, contained on pages 536 to 543, both inclusive, of the Laws of Missouri, 1937, heretofore in this decree particularly designated, does not violate the provisions of the Commerce Clause of the Constitution of the United States contained in Section 8, Article I thereof, or the Equal Protection Clause of said Constitution contained in Section 1 of the Fourteenth Amendment thereto.

It Is Further Ordered, Adjudged and Decreed that the temporary restraining orders heretofore issued in the several constitutent clauses be, and the same hereby are, dissolved.

It Is Further Ordered, Adjudged and Decreed that the applications for a temporary injunction and for a permanent injunction in each of the constituent causes be, and the same hereby are, denied.

It Is Further Ordered, Adjudged and Decreed that the defendants' motion to dismiss the petitions in each of said constituent causes for want of equity be and the same are [fol. 72] hereby sustained, and that plaintiffs' petitions in each of said constituent causes be and the same are hereby dismissed.

It Is Further Ordered, Adjudged and Decreed that the costs incurred herein in each of said contituent causes be, and the same are, hereby adjudged against the respective plaintiffs therein.

It Is Further Ordered, That this decree be filed and entered in the above entitled cause No. 668 In Equity, and that conformed copies hereof be filed in each of the above styled causes In Equity Nos. 669, 670, 671 and 672.

J. W. Woodrough, Circuit Judge. Merrill E. Otis, District Judge. J. C. Collet, District Judge.

This March 16, 1938.

[fol. 73] IN UNITED STATES DISTRICT COURT

TEMPORARY RESTRAINING ORDER PENDING APPEAL—Filed March 16, 1938

Upon this 16th day of March, 1938, plaintiffs in each of the above entitled causes filed their application for a temporary order restraining enforcement of said "Discrimination Act" until final determination of their intended appeals to the Supreme Court of the United States, and same came on for hearing. Plaintiffs appeared by their attorneys, James P. Aylward, George V. Aylward, Ralph M. Russell and Terence M. O'Brien, and defendants appeared by their attorneys, Roy McKittrick, Attorney General of the State of Missouri, Edward H. Miller, Aubrey R. Hammett, Jr., and John W. Hoffman, Assistant At-

torneys General of the State of Missouri. And the Court being fully advised in the premises, finds that the facts stated in the application are true and that, pending final determination of the appeals herein to the Supreme Court [fol. 74] of the United States, defendants, and each of them, should be and they are hereby temporarily restrained from in any manner enforcing said "Discrimination Act", and it is so Ordered.

J. W. Woodrough, Circuit Judge. Merrill E. Otis, District Judge. J. C. Collet, District Judge.

Approved: James P. Aylward, George V. Aylward, Terence M. O'Brien, Ralph M. Russell, Attorneys for Plaintiffs in Each of the Above Entitled Causes. Roy McKittrick, by John W. Hoffman, Jr., Edward H. Miller, Attorneys for Defendants in Each of the Above Entitled Causes.

[fol. 75] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed June 3, 1938

To the Honorable Joseph W. Woodrough, Circuit Judge, the Honorable John Caskin Collet, District Judge, the Honorable Merrill E. Otis, District Judge:

The above-named plaintiffs, feeling aggrieved by the decree rendered and entered in the above-entitled cause on the 16th day of March, A. D. 1938, do hereby appeal from the said decree to the Supreme Court of the United States, for the reasons set forth in the Assignment of Errors filed herein, and they pray that their appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said decree was based, duly authenticated, be sent to the Supreme Court of the United States, under the Rules of such Court in such cases made and provided.

And your petitioners further pray that the proper order relating to the required security to be required of them be made.

James P. Aylward, George V. Aylward, Terence M. O'Brien, Ralph M. Russell, Solicitors for Plaintiffs.

[fol. 76] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—Filed June 3, 1938

The appellants in the above entitled cause, and each of them, having prayed for allowance of an appeal in this cause to the Supreme Court of the United States from the decree made and entered in the above entitled cause by the District Court of the United States for the Western District of Missouri, on the 16th day of March, 1938, and from each and every part thereof, and having presented and filed their petition for appeal, assignment of errors, prayer for reversal and statement as to jurisdiction, pursuant to the statutes and rules of the Supreme Court of the United States in such cases made and provided;

It Is Now Here Ordered that an appeal be, and the same is hereby, allowed to the Supreme Court of the United States from the District Court of the United States for the Western District of Missouri, Central Division, in this cause, as provided by law, and it is Further Ordered that the Clerk of the said Court shall prepare and certify a transcript of the record, proceedings and decree in this cause, and transmit the same to the Supreme Court so that he shall have the same in the said Court within 40 days of this date;

[fol. 77] And it is Further Ordered that security for costs on appeal be fixed in the sum of Two Hundred Fifty Dollars ($250.00).

J. W. Woodrough, United States Circuit Judge. Merrill E. Otis, United States District Judge. J. C. Collet, United States District Judge.

[fols. 78-79] Bond on appeal for $250.00, approved and filed June 3, 1938, omitted in printing.

[fol. 80] IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed June 3, 1938

Come now Joseph S. Finch & Company, a corporation, The Old Quaker Company, a corporation, and Schenley

Distributors, Inc., a corporation, plaintiffs in the above-entitled cause, and file the following assignment of errors upon which they will rely in the prosecution of the appeal herewith petitioned for in said cause from the decree of this court on the 16th day of March, 1938.

(1) The court erred in holding that the Missouri Anti-Discrimination Act, which provides in part as follows:

"Section 4. The transportation or importation into this state, or the purchase, sale, receipt, or possession herein, by any licensee, of any alcoholic liquor manufactured in a 'state in which discrimination exists' is hereby prohibited, and it shall be unlawful for any licensee to transport or import into this state, or to purchase, receive, possess, or sell in this state, any alcoholic liquor manufactured in any 'state in which discrimination exists' as herein defined. * * *",

and which is contained in and appears on pages 536 to 543, both inclusive, of the Laws of Missouri, 1937, does not violate the provisions of "The Commerce Clause" of the Constitution of the United States, contained in Section 8, [fol. 81] Article I thereof, which provides as follows: "The Congress shall have the power * * * to regulate commerce * * * among the several states * * * *", because it discriminates against and excludes the importation of intoxicating and non-intoxicating alcoholic liquors produced in the states of Indiana, Pennsylvania, Massachusetts and Michigan, whether sold in competition or not with other liquors, and otherwise unduly burdens and unlawfully restrains and interferes with interstate commerce.

(2) The court erred in holding that the Missouri Anti-Discrimination Act does not violate the provisions of Section 10, Article I of the Constitution of the United States, which provides as follows: "No state shall * * * pass any ex post facto law or law impairing the obligation of contracts * * * *", for the reason that said act impairs obligations under existing contracts of plaintiffs within the state of Missouri.

(3) The court erred in holding that the Missouri Anti-Discrimination Act does not violate the provisions of Section 2 of Article IV of the Constitution of the United States, which provides as follows: "The citizens of each state shall

be entitled to all privileges and immunities of citizens in the several states", because said act denies to plaintiffs the privileges and immunities of citizens in the several states, viz., in states other than Indiana, Pennsylvania, Massachusetts and Michigan.

(4) The court erred in holding that the Missouri Anti-Discrimination Act, contained in and appearing on pages 536 to 543, both inclusive, of the Laws of Missouri, 1937, does not violate the provisions of the "Due Process Clause" of the Constitution of the United States, contained in Section 1 of the XIV Amendment thereto, which provides as follows: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person [fol. 82] of life, liberty or property without due process of law", because the Missouri Anti-Discrimination Act violates the "Due Process Clause" and, if enforced, will confiscate property of plaintiffs within the state of Missouri without due process of law.

(5) The Court erred in holding that the Missouri Anti-Discrimination Act, contained in and appearing on pages 536 to 543, both inclusive, of the Laws of Missouri, 1937, does not violate the provisions of the "Equal Protection Clause" of the Constitution of the United States, contained in Section 1 of the XIV Amendment thereto, which provides as follows: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States * * * nor deny to any person within its jurisdiction the equal protection of the laws", because the unreasonable and arbitrary classifications and restrictions imposed upon some importers of intoxicating liquors which are not imposed upon others similarly situated are not permitted by the XXI Amendment, but are violative of the "Due Process Clause".

(6) The court abused its discretion and erred in denying the interlocutory injunction.

(7) The court erred in dissolving the temporary restraining order heretofore issued herein.

(8) The court erred in denying the application for temporary and permanent injunction.

(9) The court erred in sustaining defendants' motion to dismiss plaintiffs' petition for want of equity.

(10) The court erred in dismissing plaintiffs' petition.

(11) The court erred in rendering a decree in conflict with opinions of another three-judge court in the same circuit (Eighth Circuit) on the same subject-matter, and particularly in conflict with the following cases decided by a three-judge court of the Eighth Circuit: Triner v. Arundel, 11 Fed. Supp. 145, (D. C. Minn.); Triner v. Mahoney, 20 Fed. [fols. 83-104] Supp. 1019, (D. C. Minn.), which held that in the absence of a decision of the Supreme Court of the United States holding that a state may, by virtue of the XXI Amendment, impose arbitrary and unreasonable restrictions upon some importers of intoxicating liquors which are not imposed upon others similarly situated, and which restrictions would otherwise be violative of the XIV Amendment, the court would not declare a Minnesota statute similar to the Missouri Act valid.

(12) The court erred in deciding an important question of general law in an untenable manner and in conflict with the weight of authority.

Wherefore, plaintiffs pray that the said decree may be reversed, and for such other and further relief as to the court may seem just and proper.

James P. Aylward, George V. Aylward, Terence M. O'Brien, Ralph M. Russell, Solicitors for Plaintiffs.

[fol. 105] IN UNITED STATES DISTRICT COURT

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed June 7, 1938

To A. L. Arnold, Clerk of the Above Court:

You are hereby requested to make a transcript of the record to be filed in the Supreme Court of the United States, pursuant to an appeal allowed in the above-entitled cause, and to include in such transcript of record the following, and no other, papers, to-wit:

(1) Temporary restraining order filed October 20, 1937.

(2) Notice to Governor and Attorney General of the date of presentation of application for interlocutory injunction.

(3) Order granting leave to amend bill of complaint.

(4) Amended bill of complaint.

(5) Motion to dismiss bill of complaint.

(6) Order empaneling the three-judge court and the designation of the judges thereof by the Senior Circuit Judge.

(7) Stipulation consolidating causes and providing that the hearing on interlocutory injunction should constitute the final hearing.

(8) Record entries showing submission of cause upon application for interlocutory injunction on January 10, 1938.

(9) Decree of the court filed March 16, 1938.

(10) Order extending temporary restraining order pending final determination on appeal.

[fol. 106] (11) Petition for appeal, order allowing appeal, bond on appeal, assignment of errors, citation to appellees, notice of appeal and statement directing appellees' attention to the provisions of Paragraph 3 of Rule 12 of the Supreme Court of the United States together with the acknowledgment of service of papers on the appellees as required by Paragraph 2 of Rule 12 of the Supreme Court of the United States; all filed June 2, 1938.

(12) The separate typewritten statement disclosing the jurisdiction of the Supreme Court of the United States upon appeal, with the opinion of the court delivered by Judge Otis and concurred in by Judges Woodrough and Collet.

(13) This praecipe with acknowledgment of service thereon.

You are requested to prepare this transcript as required by law and the rules of this court and the rules of the Supreme Court of the United States of America, and to file the same in the office of the Clerk of the United States Supreme Court in the city of Washington, D. C., on or before the 12th day of July, 1938, or at such later date as may be designated in an order of this court enlarging and extending said time.

Dated this 6th day of June, 1938.

James P. Aylward, George V. Aylward, Terence M. O'Brien, Ralph M. Russell, for Appellants.

Service of above Praecipe accepted and acknowledged this 6 day of June, 1938.

Roy McKittrick, Aubrey R. Hammett, Jr., Edward H. Miller, for Appellees.

[fol. 107] IN UNITED STATES DISTRICT COURT

Before Woodrough, Circuit Judge, Otis and Collet, District Judges

MEMORANDUM OPINION—Filed February 23, 1938

OTIS, District Judge, delivered the opinion of the Court:

Following the adoption of the Twenty-first Amendment to the Constitution may Missouri prohibit the sale within the state of intoxicating liquors manufactured in such other states as have laws discriminating against intoxicating liquors manufactured in other states (including Missouri)? More specifically, if Michigan has a law imposing a tax upon the importation of intoxicating liquors from Missouri and other States, which tax (or a tax similar in amount) Michigan manufacturers of intoxicating liquors are not required to pay, may Missouri lawfully prohibit the sale in Missouri of intoxicating liquors manufactured in Michigan? Such questions are presented by these cases. Missouri has such a statute. Laws of Missouri, 1937, 536. Section 4 of that statute provides:

"The transportation or importation into this state, or the purchase, sale, receipt or possession herein by any licensee of any alcoholic liquor manufactured in any 'state in which discrimination exists' is hereby prohibited, and it shall be [fol. 108] unlawful for any licensee to transport or import into this state, or to purchase, receive, possess, or sell in this state, any alcoholic liquor manufactured in any 'state in which discrimination exists' as herein defined."

The phrase, "state in which discrimination exists", is defined in the statute as we indicated in the first two sentences of this paragraph. The plaintiff (or plaintiffs) in each of the five cases is (or are) incorporated and manufacturing intoxicating liquors in a "state in which discrimination exists". The plaintiffs contend that the Missouri statute is invalid in that it violates (a) the "commerce clause" of the Constitution (Art. I, Sec. 9, Par. 8) and (b) the "equal protection clause" of the Fourteenth Amendment. They ask that the enforcement of the statute be enjoined.

The "Commerce Clause" and the Twenty-first Amendment

1. We would have thought that the first of the two contentions had in it much of merit were it not for the opinion and judgment of the Supreme Court in State Board v. Young's Market Co., 229 U. S. 59, decided December 9, 1936. That case involved the validity of a California statute imposing a license fee for importing beer. It was the opinion of the Court that while before the adoption of the Twenty-first Amendment that such a statute clearly would have been invalid ("because the fee would be a direct burden on interstate commerce" and because "the commerce clause confers the right to import merchandise free into any state, except as Congress may otherwise provide"), the effect of [fol. 109] Section 2* of the Amendment was to abrogate "the right to import free, so far as concerns intoxicating liquors" and to confer upon each state "the power to forbid all importations (of intoxicating liquors) which do not comply with the conditions which it prescribes." By reason of this opinion it must now be said that the implied prohibition upon state legislation arising from the "commerce clause" no longer exists, in so far as intoxicating liquors are concerned. So far as that one commodity is concerned the nation again is in that same situation in which it was as to all commerce before the adoption of the Constitution.

The "Equal Protection" Clause of the Fourteenth Amendment

2. The opinion and judgment in State Board v. Young's Market Co. do not, however, dispose of the second contention made by plaintiffs. It was indeed contended in that case that the challenged California statute violated the "equal protection" clause. The classification of that statute was: importers of beer and manufacturers of beer within the state. The statute discriminated against the first class in favor of the second class (although that discrimination perhaps was counterbalanced.) The Court said: "A clas-

* Section 2 of the Twenty-first Amendment provides that—
"The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

sification recognised by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth." But the classifica-
[fol. 110] tion which is "recognised by the Twenty-first Amendment is one based on a distinction between intoxicating liquors manufactured within and without a state. It does not authorise a distinction between intoxicating liquors all of which are manufactured in other states. The classification made by the Missouri statute must stand or fall as may be required by the general principles developed for the enforcement of the Fourteenth Amendment.

The provision of the Fourteenth Amendment reading—"No state * * * shall deny to any person within its jurisdiction the equal protection of the laws", was most illuminated by the Supreme Court when long ago (1886) it said that the provision guaranteed to all persons "the protection of equal laws". Yick Wo v. Hopkins, 118 U. S. 356, 369. The laws of a state must apply equally to all persons in the same or a similar situation. These principles are elementary. Equally elementary is it that a state "when enacting laws may, in its discretion, make a classification of persons, firms, corporations, and associations, in order to subserve public objects." Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 560. What are the principles by which the propriety of a classification is to be determined?

These principles again and again have been stated by the Supreme Court. "* * * (Legislation) which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the Amendment." Barbier v. Connolly, 113 U. S. 27, 32. "The Fourteenth Amendment * * * does not prohibit legislation which is
[fol. 111] limited * * * in the objects to which it is directed * * *. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions * * *." Hayes v. Missouri, 120 U. S. 68, 71. "(Classification) must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis * * * it (must be) one based upon some reasonable ground, some difference which bears a just and proper relation to the attempted classification * * *." Gulf, Colorado and Santa Fe Railway v. Ellis, 165 U. S. 150, 155, quoted in Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 560.

"* * * (It) is obvious that the legislature is the only judge of the policy of a proposed discrimination. * * * When a state legislature has declared that * * * policy requires a certain measure, its action should not be disturbed by the courts * * * unless they can see clearly that there is no fair reason for the law that would not require with legal force its excension to others whom it leaves untouched." Missouri, Kansas and Texas Railway Company v. May, 194 U. S. 267, 269.

"* * * (A) state may classify with reference to the evil to be prevented, and * * * if the class discriminated against is or reasonably might be considered to define those from whom the evil is to be feared, it properly may be picked out * * *." Patsone v. Pennsylvania, 232 U. S. 138, 144. (The case upheld a statute forbidding unnaturalized foreign born persons ow-ing shotguns). "It must be * * * said that reasonable classification implies action consistent with the legitimate interests of the state * * * these cannot [fol. 112] be so broadly conceived as to bring them into hostility to exclusive federal power." Truax v. Raich, 239 U. S. 33, 42. (The case involved an Arizona statute limiting employment of aliens lawfully within the United States). "Classification" * * * must regard real resemblances and real differences between things and persons, and class them in accordance with their pertinence to the purpose in hand." Ibid. "* * * (Classification) must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; * * * classification cannot be arbitrarily made without any substantial basis." Truax v. Corrigan, 257 U. S. 312, 337. * * *. (The) mere fact of classification is not enough to put a statute beyond the reach of the equality provision of the Fourteenth Amendment. Such classification must not be purely arbitrary, oppressive or capricious. But the mere production of inequality is not enough. * * * The inequality produced, in order to encounter the challenge of the Constitution, must be 'actually and palpably unreasonable and arbitrary.'" Radici v. New York, 264 U. S. 292, 296. "(The Amendment) does require that the classification be not arbitrary, but based on a real and substantial difference, having a reasonable relation to the subject of the particular legislation." Power Mfg. Co. v. Sanders, 274 U. S. 490, 493. "It never has been found possible to lay down any infallible or all-in-

clusive test by the application of which it may be determined whether a given difference between the subjects of legislation is enough to justify the subjection of one and not the other to a particular form of disadvantage. * * * the nearest approach to a definite rule * * * is that while the difference need not be great, the classification must not be arbitrary or capricious, but must bear some just and reasonable relation to the object of the legislation." Bayside Fish Flour Co. v. Gentry, et al., 297 U. S. 422, [fol. 113] 427.

Mr. Justice Sutherland's summary of the precedents in the case last cited undoubtedly is the best statement of a test we have. It is not "infallible", it is not "all-inclusive", but it fairly epitomizes what the Supreme Court has said since it first recognized many years ago the doctrine of classification in applications of the equal protection clause. With this test in mind and a challenged statute to be tested we might well proceed after the manner now indicated. Let it be determined: (1) what object the state seeks to accomplish by the challenged statute? (2) Does the statute place persons in two or more classes and apply differently to the different classes? (3) Can it reasonably be argued that the object of the statute will be promoted by a recognition of the differences between the classes and the different application of the statute to the several classes. If question 3 is answered in the affirmative, then, of course, the classification is not "arbitrary or capricious" and the equal protection clause is not violated. The statute may be invalid for some other reason but not because it conflicts with the Fourteenth Amendment.

What object does Missouri seek to accomplish by the challenged statute. Learned counsel for plaintiffs in their brief say that the statute was enacted "by reason of certain so-called discriminatory features in the laws of those states (Indiana, Pennsylvania, Massachusetts and Michigan) which the Legislature of Missouri believed to be harmful, not to the people as a whole, but to the brewers of Missouri who may desire to ship their products into Indiana, Pennsylvania, Massachusetts and Michigan." In his reply brief [fol. 114] the Attorney General says: The object was "by all legitimate means at its (i.e. the State's) command, to obtain a repeal of the hostile legislation (i.e. hostile to Missouri manufacturers of intoxicating liquors) in the states which had adopted protective tariffs (license-fees upon im-

portation of intoxicating liquors from Missouri and other states), and this method (i.e. the challenged statute) was chosen by Missouri when, in 1937, faced by a rising tide of discriminatory legislation in other states, its General Assembly enacted the Anti-discrimination Act." Counsel for the parties are right. Obviously the object of this statute was to promote the interests of Missouri brewers and distillers, engaged in an important industry. The statute tends to accomplish that object in two ways: (a) by shutting off some competition from the Missouri field; (b) by offering an inducement to other states to withdraw barriers to the products of this Missouri industry sought to be imported into those states. It would be idle to deny that such is the object of the statute and such the means by which the object is sought to be accomplished.

It would be idle to deny that the object aimed at by this statute is one proper to be sought after by the state. Of course Missouri may legislate to promote the interests of any Missouri industry. Barbier v. Connolly, 113 U. S. 27, 31. The welfare of the people depends upon the success of the industries of the state. By promoting the interests of first one industry and then another the state protects and advances the welfare of all the people. One piece of legislation will be designed to benefit those engaged in agriculture, another to benefit those engaged in mining, another to benefit those engaged in manufacturing. Nor is the benefit of any single piece of legislation confined to those who first receive it. What benefits the brewers, for example, benefits also those who labor in the breweries, benefits the farmers whose grains the brewers purchase, benefits the merchants patron-[fol. 115] ized by those more directly benefited. Men reasonably might argue that what benefits any one great industry in a state benefits the whole people.

The question remains: May it be contended with any reason that this proper object of legislation will be promoted by the classification of this statute? But the question is not difficult. Who will deny that at least it can be argued with a show of reason that the Missouri statute will tend to induce Indiana, and Pennsylvania and Massachusetts and Michigan to remove the barriers they have put up to shut out the products of the Missouri brewers and distillers (as well as like products from other states)? The Missouri statute discriminates between the manufacturers of intoxicating liquors in Indiana and those, for example, in Georgia,

but for no merely arbitrary or capricious reason (as the color of their hair or the fact that the name of one state begins with the letter "I" and the name of the other begins with the letter "G"). The Missouri statute discriminates against Indiana manufacturers in favor of those in Georgia because Indiana discriminates against Missouri manufacturers and Georgia does not. The discrimination is certainly bottoned on reason, not caprice. It is bottomed on the same reason as supports those national laws which effectuate the raising and lowering of our tariffs against goods imported from foreign countries as they raise and lower their tariffs against American manufactured goods.

Conceding that the classification made in a statute is reasonably related to the object sought to be achieved by the statute, the statute must be held not to violate the equal protection clause. If the means (aside from the classification) by which the object sought to be achieved violated some provision of the Constitution other than the equal protection clause, that is a different matter. In Truax v. Raich, supra, the statute involved was held unconstitutional because the means whereby its object was sought to be achieved was [fol. 116] inconsistent with the exclusive federal power over immigration and its incidents and not because the classification had no reasonable justification. Before the adoption of the Twenty-First Amendment the statute now before us would have been held invalid because its lawful object would have sought to have been achieved by a means violating the implied prohibition of the commerce clause. But no provision of the Constitution can be pointed to which this statute now violates either in its object or the means whereby the object is sought to be achieved.

The problem may appear simpler if we suppose that the Missouri statute does not absolutely prohibit the importation of intoxicating liquors from discriminating states but puts up exactly the same barriers (i.e. license fees for importation) against the importation of intoxicating liquors from those states which they have put up against intoxicating liquors imported from Missouri and other states. Would it be said that Missouri cannot impose a license fee on intoxicating liquors imported from California which imposes a license fee on intoxicating liquors imported from Missouri, unless Missouri also imposes a license fee on intoxicating liquors imported from Texas which does not impose a license

fee on intoxicating liquors imported from Missouri? Would it be said that Missouri cannot impose a license tax on Iowa automobiles using Missouri roads and exempt Illinois automobiles from the same tax, solely because Iowa imposes and Illinois does not impose a license tax on Missouri automobiles using their respective highways. The Supreme Court has said, at least by way of clear dictum, that the last mentioned distinction is valid. Kane v. New Jersey, 242 U. S. 160, 167. The two cases are identical in principle. But if Missouri can put up a hurdle against California which it is not required to put up against Texas, it can erect also an impassable barrier (complete prohibition) against Cali-
[fol. 117] fornia while allowing free ingress to importations of intoxicating liquors from Texas.

3. Since the submission of this case a three judge court for the Eastern District of Michigan in a similar case has reached the same conclusion as that indicated in this opinion. Indianapolis Brewing Co. v. The Liquor Control Commission,—Supp—

Findings of Fact and Conclusions of Law

We find the facts to be as stipulated by the parties and conclude as a matter of law that the bills should be dismissed.

The Attorney General will submit appropriate forms of decrees.

[File endorsement omitted.]

[fol. 118] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 119] In United States District Court

[Title omitted]

Order Extending Time to File Transcript of Record

For satisfactory reasons appearing to the Court, the time for filing the record in this case in the Supreme Court of the United States of America, pursuant to the appeal allowed

and citation issued herein, is hereby extended to August 12, 1938.

Dated this 23rd day of June, 1938.

J. W. Woodrough, United States Circuit Judge. Merrill E. Otis, United States District Judge. J. C. Collet, United States District Judge.

Attest. A true copy.

A. L. Arnold, Clerk, Edna D. Morris, Deputy. (Seal.)

[fol. 119a] [File endorsement omitted.]

[fol. 120] SUPREME COURT OF THE UNITED STATES

STATE OF NEW YORK,
County of New York, ss:

Roberts G. Wilkens, being duly sworn, deposes and says that he is associated with Messrs. White & Case, the attorneys herein for the appellants, whose office is at 14 Wall Street, New York, N. Y.; that on the 3rd day of August, 1938, he served a copy of the annexed Statement of Points Relied on by Appellants under Rule 13, Paragraph 9, upon Honorable Roy McKittrick, Attorney General of the State of Missouri, Jefferson City, Missouri, by depositing a true copy of the same securely enclosed in a post-paid wrapper in a Post Office Box regularly maintained by the United States Government at 14 Wall Street in said County of New York, addressed to said Attorney General, at Jefferson City, Missouri, that being the address within the state designated by him for that purpose upon the preceding papers in this action or the place where he then kept an office.

Deponent is over the age of twenty-one years.

Robert G. Wilkens.

Sworn to before me this 4th day of August, 1938. Edward D. Robbins, Notary Public, New York County, N. Y. Co. Clk's No. 394, Reg's No. O-R-519. Cert. Filed in Bronx Co. No. 51, Reg. No. 177R40. Cert. Filed in Kings Co. No. 194, Reg. No. 448. Cert. Filed in Queens Co. No. 984, Reg. No. 3651. Commission Expires March 30, 1940. (Seal.)

[fol. 121] SUPREME COURT OF THE UNITED STATES

252-256, Inc.

[Title omitted]

[fol. 122] APPELLANTS' STATEMENT OF POINTS TO BE RELIED UPON PURSUANT TO RULE 13, PARAGRAPH 9—Filed August 5, 1938

Now come the appellants herein and for their statement of points to be relied on by them upon their appeals to this Court, pursuant to Rule 13, Paragraph 9, respectfully show as follows:

1. The Missouri Anti-Discrimination Statute, Laws of Missouri, 1937, page 536 to page 543, inclusive, and particularly Section 2 thereof, is unconstitutional because, contrary to the provisions of Section 1 of the Fourteenth Amendment of the Constitution of the United States of America, it arbitrarily, capriciously and evasively classifies, without any reasonable relation to the police power or the power vested in the states under the Twenty-first Amendment of the Constitution of the United States of America, out-of-state distillers and wholesale liquor dealers in such a manner as to arbitrarily and capriciously discriminate against certain of such distillers and wholesale liquor dealers, including the appellants.

2. The Missouri Anti-Discrimination Statute, Laws of Missouri, 1937, page 536 to page 543, inclusive, and partic-
[fol. 123] ularly Section 2 thereof, is unconstitutional and in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States of America because, in violation of the provisions of that section of the Constitution of the United States of America, the statute deprives appellants of their property without due process of law.

3. The Missouri Anti-Discrimination Statute, Laws of Missouri, 1937, page 536 to page 543, inclusive, and particularly Section 2 thereof, is unconstitutional and violates Section 1 of the Fourteenth Amendment of the Constitution of the United States of America in that it fails to apply equally to persons and corporations in Missouri and to

persons and corporations domiciled outside of Missouri lawfully transacting business therein and similarly situated and engaged in a similar business therein.

4. The Missouri Anti-Discrimination Statute, Laws of Missouri, 1937, page 536 to page 543, inclusive, and particularly Section 2 thereof, is unconstitutional and violates the provisions of the Commerce Clause of Section 8, Article 1, of the Constitution of the United States in that it places upon certain distillers, including the appellants, an undue burden in their interstate business which is in no way related to the control, regulation or prohibition of the use of intoxicating liquors in the State of Missouri but is in fact an attempt by the Legislature of the State of Missouri to enact extra-territorial legislation and by economic pressure upon citizens and corporations organized under the laws of certain sister states whose laws are thought by the Legislature of Missouri to be contrary to the view that the Missouri Legislature believes the laws of such states ought to be, to compel the repeal or amendment of the laws of such sister states.

[fol. 124] 5. The Missouri Anti-Discrimination Statute, Laws of Missouri, 1937, page 536 to page 543, inclusive, and particularly Section 2 thereof, is unconstitutional because, contrary to the provisions of Section 10 of Article 1 of the Constitution of the United States, it constitutes a law which is ex post facto and impairs the obligation of contract.

6. The Missouri Anti-Discrimination Statute, Laws of Missouri, 1937, page 536 to page 543, inclusive, and particularly Section 2 thereof, is unconstitutional because, contrary to the provisions of Article 4, Section 2, of the Constitution of the United States, it deprives the appellants of the privileges and immunities of citizens of the several states.

7. The District Court erred in dissolving the temporary restraining order issued upon the filing of the bill of complaint.

8. The District Court erred in denying the appellants' applications for temporary and permanent injunctions.

9. The District Court erred in sustaining the appellees' motions to dismiss the appellants' petitions for want of equity and in refusing to sustain the petitions upon the

ground that the Missouri Anti-Discrimination Act was unconstitutional.

Yours, etc., Joseph M. Hartfield, Esq., Attorney for Appellants, 14 Wall Street, New York, N. Y.

To Hon. Roy McKittrick, Attorney General of the State of Missouri, Jefferson City, Mo.

[fol. 124a] [File endorsement omitted.]

[fol. 125] SUPREME COURT OF THE UNITED STATES

No. 252-256, Inc.

[Titles omitted]

STIPULATION TO SUBMIT CASES NO. 252 TO 256, INC., TO THE COURT UPON THE PRINTED RECORD IN CASE NO. 252—Filed September 8, 1938

It is Stipulated between counsel for the appellants and appellees herein that printing of the transcript of the record in each of the five above entitled causes be dispensed with and that in lieu thereof the transcript of the record in Cause No. 252, entitled Joseph S. Finch & Company, The Old Quaker Company, and Schenley Distributors, Inc., Appellants, against Roy McKittrich, Attorney General of the State of Missouri, et al., Appellees; be printed by the Clerk, filed in his office and delivered to counsel for the respective parties.

It is Further Stipulated that all five causes above entitled, numbered 252 through 256 inclusive, be submitted to [fol. 126] the Court for its consideration and determination upon the printed record in said Cause No. 252.

It is Further Stipulated that the decision and determination of the Court in Cause No. 252 shall constitute the decision and determination of the Court in each of the other four causes above entitled numbered 253, 254, 255 and 256, respectively, with the same force and effect as though the transcript of the record in each of said causes had been printed in full and separately considered by the Court in arriving at its decision.

It is Further Stipulated that subject to the approval of the Court, counsel for any party hereto may on his brief or in his argument refer to any portion of the transcript of the record filed with the Clerk of the Court in any of the causes.

It is Further Stipulated that the Court's mandate in each cause shall be governed by and be in accordance with its decision in Cause No. 252.

It is Further Stipulated that this stipulation be added to the transcript of the record in Cause No. 252 and be printed as part of the record therein.

Dated: August 30, 1938.

Joseph M. Hartfield, Thomas Kiernan, Counsel for Appellants. Roy McKittrick, Edward H. Miller, Counsel for Appellees.

[fol. 127] State of New York,
County of New York, ss:

Thomas Kiernan, being duly sworn, says:

He is an attorney at law associated with Joseph M. Hartfield, counsel for the appellants in the above entitled appeals.

On September 7th, 1938, deponent mailed to Edward H. Miller, Assistant Attorney General of the State of Missouri, in a securely sealed envelope with the necessary prepaid postage attached thereto, a copy of the attached designation addressed to the said Edward H. Miller at his office, 1610 Boatmen's Bank Building, St. Louis, Missouri.

Deponent further states that said Edward H. Miller is address to which deponent forwarded the said designation. is the address given deponent by the said Edward H. Miller as his office address within the State of Missouri.

Thomas Kiernan.

Sworn to before me this 7th day of September, 1938. Edward D. Robbins, Notary Public, New York County. N. Y. Co. Clk's No. 394, Reg's No. O-R-519. Cert. Filed in Bronx Co. No. 51, Reg. No. 177R40. Cert. Filed in Kings Co. No. 194, Reg. No. 448. Cert. Filed in Queens Co. No. 984, Reg. No. 3661. Commission Expires March 30, 1940. (Seal.)

[fol. 128] SUPREME COURT OF THE UNITED STATES

[fol. 129] DESIGNATION OF PARTS OF RECORD TO BE PRINTED PURSUANT TO RULE XIII, PARAGRAPH 9.—Filed September 8, 1938

To the Clerk of the Supreme Court of the United States:

The appellants herein, pursuant to Rule XIII, Paragraph 9, of this Court, designate the following parts of the record as being necessary to the consideration of the appeals herein:

1. Temporary restraining order filed October 20, 1937.
2. Notice to Governor and Attorney General of the date of presentation of application for interlocutory injunction.
3. Order granting leave to amend bill of complaint.
4. Amended bill of complaint.
5. Motion to dismiss bill of complaint.
6. Order empaneling the three-judge court and the designation of the judges thereof by the Senior Circuit Judge.
7. Stipulation consolidating causes and providing that the hearing on interlocutory injunction should constitute the final hearing.
8. Record entries showing submission of cause upon application for interlocutory injunction on January 10, 1938.
9. Decree of the court filed March 16, 1938.
10. Order extending temporary restraining order pending final determination on appeal.

[fol. 130] 11. Petition for appeal, order allowing appeal, bond on appeal, assignment of errors, citation to appellees, notice of appeal and statement directing apellees' attention to the provisions of Paragraph 3 of Rule XII of the Supreme Court of the United States together with the acknowledgment of service of papers on the appellees as required by Paragraph 2 of Rule XII of the Supreme Court of the United States; all filed June 2, 1938.

12. The separate typewritten statement disclosing the jurisdiction of the Supreme Court of the United States upon appeal, with the opinion of the court delivered by Judge Otis and concurred in by Judges Woodrough and Collet.

13. Præcipe for transcript of record with acknowledgment of service thereon.

14. Stipulation dated August 30, 1938 entered into by the counsel for the respective parties dispensing with the printing of the record except in cause designated No. 252, etc.

15. Statement of points relied on by appellants.

Dated: September 7, 1938.

Yours, etc., Joseph M. Hartfield, Thomas Kiernan, James P. Aylward, George V. Aylward, Terence M. O'Brien, Ralph M. Russell, Counsel for Appellants.

[fol. 131] [File endorsement omitted.]

Endorsed on cover: File No. 42, 737. W. Missouri, D. C. U. S. Term No. 252. Joseph S. Finch & Company, The Old Quaker Company, and Schenley Distributors, Inc., appellants, vs. Roy McKittrick, Attorney General of the State of Missouri, et al. Filed August 5, 1938. Term No. 252, O. T., 1938.

(7986)